/01-2953

STATE OF WISCONSIN
SUPREME COURT

RYAN SCOTT, KATHY SCOTT, and
PATRICK SCOTT,

Plaintiffs-Appellants-Petitioners,

APPEAL NO. 01-2953

v.

SAVERS PROPERTY AND CASUALTY
INSURANCE COMPANY, and
STEVENS POINT AREA PUBLIC
SCHOOL DISTRICT,

Defendants-Respondents,

WAUSAU UNDERWRITERS
INSURANCE COMPANY,

Defendant.

APPEAL FROM THE CIRCUIT COURT OF PORTAGE COUNTY
THE HONORABLE JAMES MASON, PRESIDING
TRIAL COURT CASE NO. 00-CV-286

BRIEF OF PLAINTIFFS-APPELLANTS-PETITIONERS, RYAN SCOTT, KATHY SCOTT AND PATRICK SCOTT

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ISSUES

1. Does the offer contained in the Stevens Point Area Senior High's (SPASH) Educational Planner to provide its students with counseling and scholarship services by counselors represented to be experts **combined** with a specific promise by a professional, licensed counselor, Dave Johnson (Johnson), to counsel Ryan Scott to take the courses necessary to be eligible for an NCAA Division I athletic scholarship, namely, NCAA approved core courses, and the Scotts' acceptance of that offer and reliance on that promise support a claim for breach of contract when the counselor counseled Ryan to take a course that was specifically listed as "not acceptable" by the NCAA on forms in Johnson's office?

COURT OF APPEALS ANSWER: No.

2. Does the counselor's promise to counsel Ryan to take the requisite NCAA approved core courses combined with his statement that a particular course, Broadcast Communication, was an NCAA approved core course and Ryan's reliance on that promise and statement by taking that course support a claim under the theory of promissory

estoppel when a full scholarship is rescinded because the Broadcast Communication course was not an NCAA approved core course?

COURT OF APPEALS ANSWER: No.

3. Given the Stevens Point Area Public School District's (District) statutory and regulatory obligation to provide professional post-secondary education and counseling services, does the Amended Complaint state a claim that falls within the ministerial act and/or the professional act exceptions to the so-called "discretionary act" immunity contained in Wis. Stats. § 893.80(4)?

COURT OF APPEALS ANSWER: No.

4. Is it time to discard the broad discretionary act immunity analysis in claims against municipalities in favor of a governmental legislative or judicial discretion analysis because discretionary act immunity is unjust and unworkable and has become the exception that has swallowed the rule and on the grounds that after *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), the legislature clearly

intended to limit immunity to matters that involved governmental legislative or judicial discretion?

COURT OF APPEALS ANSWER: This is a policy issue more properly addressed to the Supreme Court.

ORAL ARGUMENT

The Scotts respectfully submit that oral argument will be of aid to this Court. This case involves particularly thorny issues regarding the application of contractual theories of liability in favor of students against school districts, revision of what has come to be known as municipal "discretionary act" immunity to that intended by this court in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) as subsequently adopted by the legislature, and a school district's duty to provide post-secondary guidance and counseling services by its professional, licensed counselors pursuant to Wis. Stat., § 121.02(1)(e) and Wis. Admin. Code P.I. § 8.01(2)(e). Oral argument may help this court formulate a workable test that will result in an equitable application of municipal immunity and hopefully enable the trial bar to give accurate and meaningful advice to the citizens of this state regarding when municipal immunity will apply.

PUBLICATION

The Scotts believe the opinion in this case should be published because the issues are definitely of statewide

concern regarding the duties of school districts and their licensed, professional guidance counselors to provide accurate information to students and their families. Publication will also help develop and clarify the law in this area regarding theories of breach of contract, promissory estoppel and the application of legislative, judicial, quasi-legislative or quasi-judicial immunity generally and in cases where the municipal employee in question is a "professional."

STATEMENT OF THE CASE

The Scotts' Complaint asserts claims against the District under theories of breach of contract, promissory estoppel and negligence. On August 27, 2001, the trial court granted the District's motion to dismiss the complaint under Wis. Stat., § 802.06(2)(a)6 on the grounds that *Kierstyn v. Racine Unified School District*, 228 Wis. 2d 81, 596 N.W.2d 417 (1999) was controlling on all issues. The court declined to address the plaintiffs' arguments that the discretionary/ministerial act tests for determining entitlement to legislative or judicial function immunity are unworkable and should be discarded, stating that it was leaving the resolution of this issue to a higher court or to the legislature. Petitioner's Appendix (Pet. App.) pp. 7-9.

The Court of Appeals affirmed. *Id.* at 1-6. With respect to the breach of contract claim, the Court held that no contract existed because there was no bargained-for exchange of promises between the parties. Rather, it concluded that the obligation the District had to provide counseling services, including the specific services requested by the Scotts, was

one required by law. Wis. Stat., § 121.02(1)(e) and Wis. Admin. Code P.I. § 8.01(2)(e). *Id.* at 3.

The Court also held that the Scotts' Complaint failed to allege facts sufficient to meet two elements of a claim for promissory estoppel. First, it stated that no promise made by the District induced any action or forbearance on the part of Ryan because the District, through its counselor, did not "promise" that Broadcast Communication was an approved core course. *Id.* at 4. Second, it concluded that judicial enforcement of the alleged promise would not avoid or remedy any injustice because the District was not in charge of certifying Ryan's eligibility status or granting him a scholarship. *Id.*

On the negligence claim, the Court applied the broad discretionary act test and held that the legislative or judicial function immunity set forth in Wis. Stat., § 893.80(4) applied. The Court did not address the Scotts' policy arguments regarding this test stating that such arguments are more appropriately addressed to this Court. *Id.* at 5-6.

FACTS

This action arises out of transactions that took place between the Scotts on the one hand and a licensed, professional school counselor, Dave Johnson, on the other. Since this case arises from a motion to dismiss, the relevant facts are recited in the plaintiffs' Complaint and Amended Complaint, R. 2 (Complaint) and R. 13 (Amended Complaint), as supplemented by Exhibits A, B and C to the Scotts' response to the District's reply brief. R. 11; A. App. pp. 12-27.

The Scotts reside within the boundaries of the District. R. 2, ¶ 5. Kathy and Patrick Scott own property within the District and have paid property tax, including the school district levy to the District as well as income taxes to the State. *Id.* Ryan Scott was a student at SPASH and graduated in May of 1998 with a grade point average of 3.27 and a class rank of 215 out of 660 students. *Id.* at ¶¶ 6-7. He met all of the State of Wisconsin and District's requirements for graduation. *Id.*

Pursuant to Wis. Stat., § 121.02(1)(e) and Wis. Admin. Code P.I. § 8.01(2)(e), the District was obligated to and did provide guidance and counseling services to students at SPASH. In fact, in its educational planners, SPASH specifically made the following offer regarding guidance and counseling services to its students:

> "The Student Services/Counseling Office is your best place to start. We offer course advising, reference books and college catalogs, computer search programs, career counseling, scholarship and financial aid information, opportunities to talk with university and vocational-technical college representatives, and years of experience and expertise. Call one of the school counselors below with any questions you might have at 345-5403."

A. App. p. 17. Mr. Johnson was specifically identified by the District as one of the counselors touted as having years of experience and expertise. *Id.* Further, Johnson was a licensed professional school counselor meeting the requirements of Wis. Admin. Code P.I. § 3.49 and had been certified as such to the Wisconsin Department of Public Instruction by the District pursuant to Wis. Stat., § 121.02(1)(a) and Wis. Admin. Code P.I. § 8.01(2)(a). R. 2, ¶ 13.

The Scotts accepted the District's offer and when Ryan was a junior at SPASH he and his parents met with Johnson

and made it clear to him that Ryan was trying to obtain a hockey scholarship to an NCAA Division I school and wanted to make sure that he fulfilled the course requirements which the NCAA referred to as its approved core courses. *Id.* at ¶ 14. Ryan and his parents specifically asked Mr. Johnson if he would agree to counsel Ryan to take NCAA approved core courses for the purpose of establishing initial eligibility certification status as a student athlete to a Division I school. *Id.* at ¶¶ 15 and 16. Johnson, for and on behalf of his employer, the District, specifically agreed to advise him and help him select the courses offered by SPASH which had been confirmed by the NCAA Initial Eligibility Clearinghouse as NCAA approved core courses. *Id.*

As early as April of 1996, SPASH sent its curriculum to the NCAA Initial Eligibility Clearinghouse and received a notification from it on a Form 48-H of those courses offered by it which met the NCAA approved core course curriculum **and** those which did not. R. 2, ¶¶ 17 and 18; A. App. pp. 20-25. SPASH and its guidance counselors received that form dated April 4, 1996, January 30, 1997, July 31, 1997 and

April 21, 1998. A. App. at pp. 20-27. **Every one of these forms listed the course "Broadcast Communication" as a non-approved or not acceptable core course.** *Id.*

In November of 1997, Ryan Scott and his mother met with Johnson for the purpose of selecting the courses that Ryan needed to take during the second semester of his senior year in order to both graduate from SPASH and receive an initial eligibility certification from the NCAA as a student athlete. R. 2, ¶ 19. During that meeting, Mr. Johnson on behalf of the District reaffirmed his agreement to counsel and advise Ryan for these purposes. *Id.* Ryan told Mr. Johnson that he was interested in satisfying his English requirement by taking Broadcast Communication and he and his mother specifically asked Mr. Johnson if Broadcast Communication was an NCAA approved core course. *Id.* at ¶ 20. Mr. Johnson specifically advised Ryan and his mother that Broadcast Communication was an NCAA approved core course and, based on this representation, Ryan took this course and received an "A" in it. *Id.* at ¶ 21.

After graduating in May of 1998, Ryan played hockey in Iowa in a junior league. *Id.* at ¶ 22. By National Letter of Intent dated July 20, 1999, Ryan was offered a full four-year scholarship to play Division I hockey at the University of Alaska, Anchorage. *Id.* at ¶ 23. On July 21, 1999, Ryan and his parents accepted that scholarship offer. *Id.* That offer was specifically conditioned upon receipt of an initial eligibility certification from the NCAA. *Id.* After receipt of Ryan's final transcripts from SPASH, the NCAA determined that Ryan was not eligible for a Division I student athlete scholarship solely because the Broadcast Communication course that he took during the second semester of his senior year was not an approved core course in English. *Id.* at ¶ 24. Ryan met all of the academic requirements set by the University of Alaska, Anchorage for admission but, because he took the Broadcast Communication course, he was declared ineligible by the NCAA for a Division I athletic scholarship and, as a result, lost that scholarship. *Id.* at ¶ 25.

ARGUMENT

Introduction

The Scotts respectfully submit that if the statutory obligation to provide post-secondary guidance and counseling is to mean anything, the information disseminated by the counselors, especially when it is capable of being easily and readily verified by reference to materials in the counselor's possession, must be accurate and the District must be held to account when it is not. Otherwise, that statutory and regulatory obligation is meaningless.

Standard of Review

In analyzing a Motion to Dismiss for failure to state a claim upon which relief can be granted, this Court must accept as true all of the facts alleged in the Complaint together with all reasonable inferences that can be drawn from those facts. *Haussmann v. St. Croix Care Center*, 214 Wis. 2d 655, 662-63, 571 N.W.2d 393 (1997). The Complaint cannot be dismissed unless it appears certain that no relief can be granted under any set of facts that the plaintiffs can prove in support of their allegations. *Watts v. Watts*, 137 Wis. 2d

506, 512, 405 N.W.2d 303 (1987) and *Kranzush v. Badger State Mutual Casualty Co.*, 103 Wis. 2d 56, 82, 307 N.W.2d 256 (1981). Another way of stating this is that the Complaint is to be liberally construed and may only be dismissed if it is "quite clear that under no conditions can the plaintiff recover." *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985) and *Haussmann, supra.*

The Complaint States A Claim Upon Which Relief Can Be Granted For Breach of Contract

The Court of Appeals completely misconstrued and disregarded the Scotts' main argument on this issue. The Scotts claimed that the District, through the SPASH Educational Planner specifically offered to provide guidance and counseling services by professional guidance counselors with years of experience and expertise regarding scholarship and financial aid information. The Scotts accepted that offer and met with a licensed professional counselor, Mr. Johnson, who, **in addition**, agreed to counsel Ryan to take NCAA approved core courses so that he would meet the NCAA student athlete eligibility requirements. The Scotts assert that

the District through Mr. Johnson breached this agreement by counseling Ryan to take the Broadcast Communication course which was not an NCAA approved core course and as a result, Ryan was ruled ineligible for the scholarship offered by the University of Alaska, Anchorage.

The precise issue presented here has not been addressed by any Wisconsin Appellate Court. However, courts from other jurisdictions have held that such promises by schools and guidance counselors do give rise to a breach of contract claim. *Hendricks v. Clemson University*, 339 S.C. 552, 529 S.E.2d 293, 299-300 (2000) (breach of contract claim allowed for failure to give accurate advice according to NCAA regulations which rendered the plaintiff ineligible to play baseball); *Ross v. Creighton University*, 957 F.2d 410, 415-417 (7th Cir. 1992) (breach of contract claim allowed for failing to honor promise to provide the tutoring necessary for plaintiff to obtain a meaningful college education and degree); *Wickstrom v. North Idaho College*, 111 Idaho 450, 725 P.2d 155, 157-158 (1986) (breach of contract claim

allowed for violation of promise that graduates would be qualified for employment as entry level journeyman).

Although these cases deal specifically with post high school education, the principles announced therein are directly applicable to this case. These cases, and the other cases discussed therein, accept the proposition that the relationship between the student and the institution is contractual in nature. The terms of the agreement are usually implied and found in the institution's bulletins and other publications. An example of those terms can certainly be found in the SPASH Student Planner for the 1997-1998 school year where the representations regarding the student guidance and counseling services alleged in the complaint are found. See A. App. pp. 12-19.

This Is Not A Case Of Educational Malpractice

At this point, we must note that this is not an action for what some cases have referred to as "educational malpractice." *See, e.g. Ross, supra.* It involves a very definite and specific promise made by an agent of the District acting within the scope of his authority and in his professional

capacity as a licensed guidance counselor. The complaint alleges that Mr. Johnson's agreement to counsel Ryan to take NCAA approved core courses was breached when he counseled Ryan to take a course which was specifically listed on materials in Johnson's possession as a non-approved core course.

On this point, the Scotts respectfully refer this court to the remarkably factually similar case of *Sain v. Cedar Rapids Community School District*, 626 N.W.2d 115 (Iowa 2001). During his junior and senior years in high school, Bruce Sain received many basketball accolades and felt he might be NCAA Division I scholarship material. As a result, he sought counsel from one of his high school's guidance counselors for the purpose of selecting courses that would meet the NCAA core course curriculum. During his senior year in high school, the counselor suggested that he take an English course entitled "English Literature." When Sain became dissatisfied with this course, he met with his counselor to determine if he could drop it and add another English course. His counselor said he could and recommended that he take a course labeled

"Technical Communications." The "Technical Communications" course was not on the NCAA Form 48-H, for Sain's high school. However, his counselor told him that the course "would be approved by the NCAA as a core English course." *Id.* at 119. Sain satisfactorily completed the "Technical Communications" course and, before graduating from high school, received and accepted a full five year basketball scholarship to Northern Illinois University. Shortly after graduating, Sain lost that scholarship because the "Technical Communications" course did not satisfy the NCAA's core English requirements. *Id.* at 119-20.

In this practically identical context, the Supreme Court of Iowa held: (1) the claims asserted by Sain were not for "educational malpractice;" and (2) the claim for negligent misrepresentation against the school district arising out of the representations of the guidance counselor was viable under Iowa's interpretation of the Restatement (Second) of Torts § 552. In reaching this conclusion, the Iowa Supreme Court exhaustively discussed the concept of educational malpractice and distinguished *Sain* because it dealt with the provision of

specific information requested by a student under circumstances in which the school knew or should have known that the student was relying on the information to qualify for future educational athletic opportunities. *Id.* at 122. The Scotts' case is even further removed from an educational malpractice claim because, rather than guessing whether the course "would" be approved as a core course in English, Johnson could have easily, readily and objectively determined that the course he was recommending was not an approved core course in English by simply consulting the list of approved and non-approved core courses on SPASH's Form 48-H in his office.

The Assertion That Performance Of A Duty Imposed By Law Cannot Constitute Consideration Sufficient To Support A Contract In This Case Is Erroneous

The Appellate Court held that the alleged contract was not supported by consideration. Rather, it stated that the District was obligated by law to provide "certain" counseling services once the Scotts chose to send Ryan to SPASH. The Court overlooked the fact that the Scotts' breach of contract claim takes it a step further and focuses specifically on the

agreement between Mr. Johnson which took place during Ryan's junior and senior years whereby the District through Mr. Johnson specifically agreed to counsel Ryan to take NCAA approved core courses so that he could be determined to be eligible for an NCAA Division I scholarship. The Court simply concluded without citation to any authority whatsoever that the alleged contract was not supported by sufficient consideration. A. App. p. 3.

The Scotts contend that their alleged contract is supported by sufficient consideration in the form of a promise for a promise: the District promises to provide the services referenced in the SPASH Educational Planner and, in addition, as specifically agreed to by Mr. Johnson, and Ryan Scott promises to continue to attend SPASH and utilize those services. Further, the constitutional and statutory structure of the educational system in Wisconsin is, in itself, a social contract supported by more than sufficient consideration. The specific promises involved herein can be viewed as part of that overall statutory and constitutional scheme.

The concept of whether the performance of a duty imposed by law is supported by consideration is addressed in 17A Am. Jur. 2d, Contracts, § 164:

> **"164. Existing legal or equitable obligations.**
>
> "An existing legal duty was at a comparatively early date recognized as a sufficient consideration to support an express promise. At a much later date, the notion that an existing legal debt may serve as a consideration was extended to express promises to perform any kind of legal obligation. **At present the doctrine is generally established that an express promise, made to the person entitled to the performance of an existing legal obligation, will be enforced** [Emphasis supplied]. Accordingly, although a promise to do a thing which the promisor is legally bound to do is not generally a sufficient consideration to support a reciprocal undertaking by the promisee, such promise may be enforced against the promisor, notwithstanding its enforcement compels the performance of that which is already a legal obligation. There is also some authority to the effect that an equitable obligation is sufficient to support an express promise. **A sufficient consideration for a contract may be found in the fact that it puts into form the legal and equitable obligations existing between the parties** [Emphasis supplied]."

Id. at p. 179. Therefore, this general rule clearly dictates that the District and Mr. Johnson's promise to provide the specific counseling services requested and the specific counseling services which they agreed to provide is supported by sufficient consideration. At a minimum, sufficient consideration for a contract should be found in order to give

the legal and equitable obligations existing between the parties substance, i.e., put those obligations "into form." *Id.*

The Second Restatement of Contracts takes a bit different approach to this issue. Section 73 addresses the question of whether performance of a legal duty constitutes sufficient consideration for performance of a promise. It states:

> "Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain."

Id. at p. 179.

Comment b addresses the concept of the type of public duties involved here and states:

> "In applying this section it is first necessary to define the legal duty. **The requirement of consideration is satisfied** if the duty is doubtful or is the subject of honest dispute, or **if the consideration includes a performance in addition to or materially different from the performance of the duty** [Emphasis supplied]. Whether such facts eliminate duress or violation of public policy or other invalidating cause depends on the circumstances.... **In some situations, however, where there is no other invalidating cause but lack of consideration, the bargain may be enforceable by virtue of reliance or unjust enrichment or formality. See §§82-109** [Emphasis supplied]."

Id. at pp. 180-81.

Therefore, according to Am. Jur., the promise made by Johnson and the District to the Scotts is supported by sufficient consideration. According to the Restatement of Contracts, the promise made by the District and Johnson is not supported by sufficient consideration **only if** the legal duty is so clear and specific that it leaves absolutely no room for doubt or discretion.[1] The requirement of consideration is satisfied if the consideration includes a performance in addition to the performance of the legal duty.

If the legal duty dictated by Wis. Stat., § 121.02(1)(e) and Wis. Admin. Code P.I. § 8.01(2)(e) obligated the District and Mr. Johnson to provide the specific post-secondary planning guidance and counseling services requested by the Scotts, namely, to counsel Ryan to take NCAA approved core courses and, if the general rule recited in Am. Jur. is rejected and the Restatement rule is accepted, then the contract would not be supported by sufficient consideration. **However, the logical result of such a conclusion would be that the District and Mr. Johnson's legal duty to provide post-**

[1]However, in this instance the promise is enforceable under the doctrine of promissory estoppel set forth in § 90 of the Restatement. *Id.*

secondary guidance and counseling services specifically with respect to taking approved NCAA core courses is, without any doubt whatsoever, ministerial and therefore the District would clearly not be immune from the negligence claim.

The District simply cannot be allowed to state on the one hand that it was legally obligated to provide the specific counseling services at issue here in an attempt to defeat the breach of contract claim and, on the other, assert that this legal duty was discretionary as contrasted with ministerial. These positions are inconsistent and evince the type of an attempt to manipulate the judicial system to which the doctrine of judicial estoppel described in *State v. Petty*, 201 Wis. 2d 337, 346-353, 548 N.W.2d 817 (1996) should be adopted and applied.

The plaintiffs' respectfully submit that the Am. Jur. rule is the better rule and should be applied. Also, since the District is claiming that its conduct, through Mr. Johnson, in specifically promising to counsel Ryan Scott to take NCAA approved core courses and in telling him that the Broadcast

Communication course was an NCAA approved core course is immune because it involved the exercise of discretion, then the only conclusion that can be drawn for purposes of the Restatement analysis is that Mr. Johnson's specific promise to guide and counsel Ryan to take NCAA approved core courses included performance in addition to or different from the performance of the legal duty. Therefore, if the District's position on discretionary act immunity is accepted, the Restatement analysis also dictates the conclusion that the promise was supported by sufficient consideration.

Consideration - Promise For A Promise

Promises of the type made by the District in its SPASH Educational Planner and specifically by Mr. Johnson to the Scotts, constitute consideration for a student's agreement to attend and continue attending a particular school. The student's agreement to attend and continue attending a particular school likewise constitutes consideration for the promises made by that school in its brochures, educational planners, etc. *Hendricks, supra*; *Ross, supra*; and *Wickstrom, supra* and cases cited therein.

This case involves a very definite and specific promise made by an agent of the District acting within the scope of his authority and in his professional capacity as a licensed, professional guidance counselor. Johnson's agreement to counsel Ryan to take NCAA approved core courses was breached when he counseled Ryan to take a course which was specifically listed on materials in Johnson's possession as a non-approved core course, namely, "Broadcast Communication."

The District's promise to students and parents to provide counseling services and professional, expert counselors plus the specific promise by Mr. Johnson to advise Ryan to take NCAA approved core courses and the specific affirmation that the "Broadcast Communication" course was an NCAA approved core course constitute a promise which is supported by sufficient consideration. The Scotts utilization of the services promised and their continued enrollment of Ryan in a district school, especially in light of school choice options, is sufficient consideration on their part. These are promises for promises which are clearly recognized as

sufficient consideration in Wisconsin. *Ferrarro v. Koelsch*, 124 Wis. 2d 154, 165-167, 368 N.W.2d 666 (1985) (promises in an employee handbook can alter the employee at will doctrine).

Taxes As Consideration

The Appellate Court held that payment of state income and local property taxes cannot serve as consideration for the promises in question. The Scotts submit that this holding evinces a clear misunderstanding of the nature of the relationship between the government and the citizens of this state with respect to public education.

Article 10, Section 3 of the Wisconsin Constitution states that district schools must be free and without charge for tuition to all children between the ages of four and twenty. In order to support this constitutional mandate, the legislature has enacted a funding formula. That formula is explained in *Vincent v. Voight*, 2000 WI 93, ¶ 7, 236 Wis. 2d 588, 604, 614 N.W.2d 388 (2000). The majority of school funds are derived from property taxes. *Id.* at ¶ 6, 236 Wis. 2d 603. However, the number of students enrolled in a district determines the

amount of money the district will get. *Id.* at ¶ 7, 236 Wis. 2d 604. Consequentially, under this statutory and constitutional scheme, the decision to attend and to continue attending a district school, such as SPASH, as contrasted with Pacelli or one of the high schools in the surrounding communities like Wisconsin Rapids, Mosinee, Marshfield, Wausau, etc., under the school choice program, is, in and of itself, sufficient consideration to support the contract claim. Therefore, in this context, payment of taxes and attendance at a District school constitutes sufficient consideration.

Conclusion - Breach of Contract

The Court of Appeals' Decision on this substantial issue makes little sense. To accept it, this Court would have to conclude that the District, which is admittedly obligated by statute and administrative regulation to provide guidance and counseling services, and who acts through its licensed professional guidance counselor, can avoid the consequences of a breach of a very specific promise made by that guidance counselor. When the District, through a licensed professional guidance counselor, promises to counsel a student to take

courses that are NCAA approved core courses, or for that matter, the courses necessary to gain admittance to any post secondary institution, the District must be held to keep that promise. Otherwise, its statutorily and contractually imposed duty is nullified.

Therefore, given the standard by which the District's Motion to Dismiss is to be judged, the plaintiffs must be allowed to proceed on their breach of contract claim because the facts alleged in the Complaint, liberally construed, can give rise to the requested relief for breach of contract. *Watts, supra* and *Kranzush, supra.*

The Complaint States A Claim Upon Which Relief May Be Granted For Promissory Estoppel

This case is perfectly ripe for the application of the principle of promissory estoppel. The elements of a cause of action for promissory estoppel as set out in *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965) are:

> "(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?

(2) Did the promise induce such action or forbearance?

(3) Can injustice be avoided only by enforcement of the promise?"

The Court of Appeals attempted to make an illogical distinction between the District's promise through Johnson to counsel Ryan to take NCAA approved core courses and Johnson's counsel that the Broadcast Communication class was an NCAA approved core course. It labeled his promise to counsel Ryan to take NCAA approved core courses as the "promise" and his counsel that the Broadcast Communication course was an NCAA approved core course as a "representation." Then, after constructing this illogieal dichotomy concluded that the plaintiffs have not alleged that Ryan relied on Johnson's promise to counsel him to take NCAA approved core courses. Rather, it stated that Ryan relied on Mr. Johnson's representation that the Broadcast Communication course was an NCAA approved core course and did not rely on Johnson's promise to counsel him to take NCAA approved core courses.

Commonsense and application of valid logical reasoning leads to but one conclusion: The promise to

counsel Ryan to take NCAA approved core courses must necessarily include the promise to give accurate counsel regarding the courses the counselor is telling the student to take. Further, 18 McQuillan, Municipal Corporations (3d ed.) § 53.04.25 on the public duty rule supports this conclusion. Special duties to a plaintiff can be grounded in justifiable reliance on a municipal agent's actions particularly when there is direct contact between the agent and the plaintiff. *Id.* and *infra* at pp. 44-45. There certainly was a special relationship between Johnson and Ryan Scott. In fact, their relationship meets the definition of a "fiduciary relationship." *Hendricks, supra* at 562-63.[2] In the very least, Johnson was a trusted advisor to the Scotts. *Sain, supra* at 125-127. Therefore, the complaint contains allegations sufficient to meet this element of the theory of promissory estoppel.

The Court also held that the Complaint fails to allege the third element of promissory estoppel, namely, that justice

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[2]Certainly, if an insurance company is in a special fiduciary relationship with its insured, *Donner v. Auto Owners Ins.*, 2001 WI 90, ¶ 49, 245 Wis. 2d 49, 69-70, 629 N.W.2d 159 (2001), a high school guidance counselor must be in a special fiduciary relationship with the students who seek and obtain his services.

can only be avoided by enforcement of the promise. It reached this conclusion by stating that the District was not the entity in charge of certifying Ryan's eligibility status or granting him the scholarship and, therefore, judicial enforcement of the alleged promise would not avoid or remedy any injustice which may have occurred.

Enforcement of the alleged promise to counsel Ryan to take NCAA approved core courses would have resulted in the taking and passing of approved core courses. Therefore, Ryan would have taken approved core courses and would have qualified for the scholarship that was offered to him. The clock cannot be turned back and Ryan cannot be returned to the University of Alaska, Anchorage as a freshman with a full four year scholarship and four years of eligibility. However, the injustice suffered by him and his parents can be remedied in part by compensating them in the amount of the value of that scholarship plus all out-of-pocket expenses incurred by them in relation to Ryan's college education. *Kramer v. Alpine Valley Resort, Inc.*, 108 Wis. 2d 417, 427, 321 N.W.2d 293 (1982) and *Head & Seemann, Inc. v. Gregg*,

104 Wis. 2d 156, 311 N.W.2d 667 (Co. App. 1981) *aff'd.* 107 Wis. 2d 126, 318 N.W.2d 381 (1982).

The Legislative, Quasi-Legislative, Judicial or Quasi-Judicial Function Immunity Granted By Section 893.80(4) Does Not Apply To Johnson's Acts

Citing *Kierstyn, supra*, the Court of Appeals held that the legislative, quasi-legislative, judicial and quasi-judicial function immunity granted by § 893.80(4) applies to any conduct engaged in by a municipal employee within the scope of his or her employment that can be characterized as "discretionary." The multitude of cases that have considered this issue belie such a simplistic analysis. *See, e.g. Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 292 N.W.2d 816 (1980); *Lodl v. Progressive Northern Ins. Co.*, 2001 WI 71, 253 Wis. 2d 323, 646 N.W.2d 314 (2002); *Barillari v. City of Milwaukee*, 194 Wis. 2d 247, 533 N.W.2d 759 (1995); and *Linville v. City of Janesville*, 184 Wis. 2d 705, 516 N.W.2d 427 (1994). The municipal immunity provided for in §893.80(4) must be distinguished from the general rule of immunity for state employees set forth in Wis. Stat., § 893.82. **In the municipal employee context, which includes school**

district employees, liability is supposed to be the rule and immunity the exception. *Lodl, supra*, at ¶ 22. *Kimps v. Hill*, 200 Wis. 2d 1, 11, 546 N.W.2d 151 (1996).

The plaintiffs respectfully submit that the immunity set forth in Wis. Stat., § 893.80(4) does not apply because: (1) the actions of counselor Johnson at issue in this case did not involve the exercise of governmental - legislative or judicial - discretion, i.e. they did not require the establishment of policy or the application of statutes to facts; (2) the District failed to discharge the duty imposed on it by statute and by regulation in a non-negligent manner; and (3) Johnson's acts, under the facts of this case, were ministerial.

Historical Background

Prior to June 5, 1962, the rules surrounding municipal tort immunity were dependent upon highly artificial judicial distinctions between conduct viewed as "proprietary" and that viewed as "governmental."[3] *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 32, 115 N.W.2d 618 (1962). The *Holytz* court was highly critical of the doctrine. It stated:

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[3]This sounds a lot like the present attempt to distinguish between acts viewed as "discretionary" versus those viewed as "ministerial."

> "The rule of sovereign immunity developed in this country from an English doctrine and has been applied in the United States far beyond its original conception. The doctrine expanded to the point where the historical sovereignty of kings was relied upon to support a protective prerogative for municipalities. This, according to Professor Borchard, 'is one of the mysteries of legal evolution.' Borchard, Government Liability in Tort, 34 Yale L.J. 1, 4 (1924). It would seem somewhat anomalous that American courts should have adopted the sovereign-immunity theory in the first place since it was based upon the divine right of kings."

Id. at 30. The court also invented a "governor to governed" test for applying immunity. *Id.* In *Holytz*, after summarizing numerous judicial and scholarly opinions which castigated the doctrine, **the court abolished it except for conduct undertaken in the exercise of "legislative or judicial or quasi-legislative or quasi-judicial functions."** [Emphasis supplied]. *Id.* at 40. The court also stated that if the legislature deemed it better public policy it could reinstate the immunity, impose ceilings on the amount of damages awarded and set up administrative requirements which may be preliminary to the commencement of judicial proceedings for an alleged tort. *Id.* The court also clearly distinguished immunity for the state on one hand and immunity for the municipalities-subdivisions of the state--on the other. *Id.* at 41-42.

In 1963, the legislature deemed it better policy to follow the Supreme Court's lead in abolishing municipal immunity. It responded to *Holytz* by enacting what became Wis. Stat., § 331.43 which paroted the *Holytz* language by **only** preserving immunity "for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." That identical language is found in Wis. Stat., § 893.80(4). This is exactly how the noted language in *Holytz* and therefore the immunity statute was interpreted in *Dusek v. Pierce County*, 42 Wis. 2d 498, 505-506, 167 N.W.2d 246 (1969) ("in *Holytz* we pointed out that imposing the general rule of liability to negligence upon municipalities did not abrogate the rules of immunity for conduct that is within the realm of **legislative or judicial** discretion [Emphasis supplied].") and *Forseth v. Sweet*, 38 Wis. 2d 676, 689, n.7, 158 N.W.2d 370 (1968) (where the court went so far as to say that "the legislature, although failing to reinstate immunity, established a damage limit of $25,000. Sec. 895.43, Stats.").

As the appellate court recently observed in *Hoskins v. Dodge County*, 2002 WI A. App. 40, ¶ 14, 251 Wis. 2d 276, 290, 642 N.W.2d 213 (Ct. App. 2002):

> "The phrase, 'acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions,' might appear to encompass a relatively narrow range of official actions in decision making. Case law, however, has defined the phrase as being synonymous with 'discretionary' acts."

Our research indicates that this proposition, namely, that acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions for purposes of Wis. Stat., § 893.80(4) immunity are synonymous with discretionary acts is traceable to *Lifer v. Raymond*, 80 Wis. 2d 503, 511-12, 259 N.W.2d 537 (1977). *See, Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, ¶ 25, 235 Wis. 2d 409, 424-25, 611 N.W.2d 693 (2000); *C.L. v. Olson*, 143 Wis. 2d 701, 717, 422 N.W.2d 614 (1988); *Scarpaci, supra* at 683. *Lifer* was the famous or infamous, "how fat is too fat?" case. It did not involve municipal liability. Rather, it arose out of a claim against a state employee, a D.O.T driver's licensing examiner. In the state employee context, as contrasted with the municipal employee scenario, immunity is the rule and

liability the exception. *Kimps, supra* at 10. The discretionary and ministerial act tests for determining the existence or non-existence of immunity, therefore, arose in the context of claims where immunity is the rule and liability the exception. *Id.* and *Lister v. Board of Regents*, 72 Wis. 2d 282, 300, 240 N.W.2d 610 (1976). Thus, it is not surprising that in the municipal employee context, the exception, immunity, has now swallowed the rule, liability.

Further, the language in *Lifer* that is responsible for the importation of the discretionary/ministerial act test from the state employee context to the municipal employee context is, therefore, clearly dicta. After expressly noting that the predecessor to Wis. Stat., § 893.80(4), namely, § 895.43(3) did not apply to the state or its departments, officers or employees, the court stated:

> "Although the plaintiff contends that the defendant is immune from suit only for acts which are legislative, judicial, quasi-legislative or quasi-judicial, we base our contrary conclusion on the principles of official immunity set out in *Lister* that the defendant is not liable for his discretionary acts. To so hold is not to imply that the test for the immunity of a state officer set out in *Lister* is different from the test for the immunity of a municipal officer under sec. 895.43(3) [now sec. 893.80(4)], Stats. **A**

> **quasi-legislative act involves the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed. A quasi-judicial act involves the exercise of discretion and judgment in the application of a rule to specific facts.** [Emphasis added] [n. 18]. Acts that are 'legislative, quasi-legislative, judicial or quasi-judicial functions,' [n. 19] are, by definition, nonministerial acts [n. 20]. **As applied,** [Emphasis added] the terms 'quasi-judicial or quasi-legislative' and 'discretionary' are synonymous and the two tests result in the same finding. That finding is that this defendant is not liable to the plaintiff in damages, as a matter of law, for determining that at the time he administered the driving test, Jeannine M. Yingling was not too fat to drive."

Id. at 511-512.

The quoted language, however, cannot be properly interpreted without specific reference to the court's footnotes 18 and 20. In footnote 18, the court cited *Weiss v. Milwaukee*, 79 Wis. 2d 213, 233, 255 N.W.2d 495 (1977) for the proposition that a city would be performing a quasi-judicial function in exercising its discretion to place a stop sign in a particular location because doing so would involve a legal determination based upon the application of the statutes and rules. *Id.* In note 20, the court cited *Allstate Insurance v. Metropolitan Sewerage Commission*, 80 Wis. 2d 10, 17-18, 258 N.W.2d 148 (1977) for the proposition that the power of

a municipal corporation to issue a permit or license is a quasi-judicial function. Therefore, a proper interpretation of the *Lifer dicta* would clearly limit immunity under sec. 893.80(4) to the exercise of **governmental** discretion or judgment in setting policy or establishing rules and in applying such rules to specific facts. To do so would result in a very narrow grant of immunity, namely, to functions which involve the making of laws including municipal ordinances and regulations, and the interpretation and application of laws including municipal ordinances and regulations to specific facts. A perusal of the Wisconsin Appellate and Supreme Court Opinions, however, reveals that a very expansive definition has been given to the discretionary act test for the purpose of determining whether legislative or judicial function immunity applies. *See, Lodl, supra* and *Kierstyn, supra*, and cases cited therein.

If Johnson Exercised Discretion It Was Professional And Non-Governmental

With this historical background we can address *Kierstyn, supra. Kierstyn* arose out of a claim that a school district employee who held the title of a "benefits specialist" gave erroneous information regarding Wisconsin Retirement

System (WRS) disability benefits to the plaintiff. This school district employee instructed the plaintiff to contact the WRS. The plaintiff received accurate written information from WRS. Further, and importantly, the school district employee was not employed by the WRS **and** was not obligated by statute or regulation to give the requested information.

In discussing the plaintiff's claim that the school district's employee's conduct was "professional" in nature, and therefore not "governmental" the court recounted the cases that discussed this concept. It recognized that in *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 292 N.W.2d 816 (1980), the court held that for the immunity to apply, the discretionary acts in question had to be "governmental" in nature. *Scarpaci* involved alleged discretionary acts by a medical examiner which led the court to make the obvious conclusion that the discretion in question was "medical" not "governmental."

The court also noted that this distinction had been applied in two subsequent cases, both involving professional medical judgment. *Protic v. Castle Company*, 132 Wis. 2d

364, 369-70, 392 N.W.2d 119 (Ct. App. 1986) and *Gordon v. Milwaukee County*, 125 Wis. 2d 62, 67-69, 370 N.W.2d 803 (Ct. App. 1985). Finally, the court noted the appellate court's decision in *Stann v. Waukesha County*, 161 Wis. 2d 808, 818, 468 N.W.2d 775 (Ct. App. 1991) where the court concluded that *Scarpaci* did not extend any further than the medical setting. This statement from *Stann*, however, is not precedential since *Holytz*, *Dusek* and *Forseth* had already held that the immunity **was** limited to governmental - legislative or judicial discretion. A proper interpretation of *Lifer* also dictates this conclusion.

After noting these decisions, the court expressly addressed the "professional" or "non-governmental" exception to immunity and concluded that it did not apply because the school district employee was not what it considered a "professional". It is ironic, however, to note that in doing so, the court observed that if it concluded that the district employee who was labeled a "benefits specialist" were considered a "professional" for purposes of the *Scarpaci* exception, then that exception would swallow the rule. We

respectfully submit that in making this observation in *Kierstyn* the Court got it backwards. **The *Holytz* rule as specifically adopted by the legislature was and still is, given the language used in Wis. Stat., § 893.80(4), that liability is the rule and immunity is the exception.**

In any event, the court defined what it would consider a "profession" for purposes of the *Scarpaci* rule. It adopted the following Webster's Dictionary definition:

> "... a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of public service."

Kierstyn, supra at 98-99.

Mr. Johnson meets this definition. The Complaint alleges that at all times material he was a licensed professional school counselor meeting the requirements of Wis. Admin. Code P.I. §3.49 and had been certified as such to the Wisconsin Department of Public Instruction by the District pursuant to Wis. Stat., § 121.02(1)(a) and Wis. Admin. Code P.I. § 8.01(2)(a). Wis. Admin. Code P.I. § 3.49

specifically refers to those people who hold "professional school counselor" licenses. In order to obtain one, the applicant has to complete or possess the following:

> "(a) A master's degree with a major in school counseling and guidance or a master's degree with at least 30 semester credits in an approved school counseling and guidance program and the institutional endorsement.
>
> (b) 1. Eligibility for a license to teach or completion of an approved program and two years of successful teaching experience at the elementary, middle, or secondary level, or
>
> 2. An approved one-year, full-time internship in school counseling at the elementary, middle, or secondary level, or
>
> 3. A minimum of two years of successful experience as a licensed school counselor in an assigned position of one-half time or more.
>
> (c) Demonstrated proficiency in each of the following areas:
>
> 1. Understanding the philosophy, purpose, and structure of the total school enterprise including the organization and administration of public schools and pupil services programs.
>
> 2. Understanding the psychological foundations of individual and group behavior, including vocational psychology, the structure of personality, child and adolescent development, and the teaching and learning processes.
>
> 3. Understanding cultural and societal conditions which affect pupils' development and learning including ethnicity, special education populations, work values, economic systems, urban and rural lifestyles, cultural mores, health and nutrition problems, changing sex roles, stereotyping, demographics, and parenting.
>
> 4. Ability to develop staff relationships for the effective implementation of guidance programs within the total curriculum including the understanding of and ability to engage in consulting, coordinating, and communicating functions.
>
> 5. Understanding career development theories and practices over the lifespan and the ability to use this knowledge effectively in the school guidance program.

> 6. Understanding professional issues including pupil rights, the school counselor's relationship to the law, codes of ethics, goals and objectives of professional organizations, standards of preparation and licensing, and role identity of counselors.
>
> 7. Understanding child welfare systems such as but not limited to juvenile justice, public health, mental health, developmental disabilities, and county social services; systems which provide services to children identified as juvenile delinquent, mentally ill, developmentally disabled or in need of protection and services.
>
> 8. Ability to effectively organize and administer comprehensive school guidance programs including the utilization of community resources and appropriate technology in the program.
>
> 9. Ability to generate, analyze, and synthesize data about the behaviors, progress, and needs of pupils individually and within groups.
>
> 10. Ability to interpret relevant pupil services research and to implement evaluation procedures necessary for the improvement of school practices related to counseling and guidance.
>
> 11. Understanding how to provide counseling and group guidance processes which facilitate pupils' self-awareness, self-understanding and self-acceptance in relation to educational and career development as evidenced by satisfactory completion of a supervised practicum experience in a school setting."

If Mr. Johnson's conduct can be characterized as discretionary, it was professional, non-governmental discretion and did not involve the exercise of legislative, quasi-legislative, judicial or quasi-judicial discretion. In a practically identical context, the Supreme Court of Iowa held that a high school guidance counselor is in the profession of supplying information to others and, as a result, can be liable

to a student under the tort of negligent misrepresentation. *Sain, supra* at p. 126. In doing so, the court analogized the role of a guidance counselor in providing information to students who seek out and utilize his services to the role of accountants, abstractors and attorneys in providing information to their clients. *Id.* at 123-125.

The result dictated by the Appellate Court's Decision is an insult to the families of all high school students who seek the statutorily mandated counseling services. Here, the District encouraged minor students to seek out the services of its professional guidance counselors, develop a trust or fiduciary relationship with the counselor, take the counselor's advice and act on it and, when that advice proves to be clearly erroneous, the District can thumb its nose at the minor student and his family and say, "Too bad, so sad." Therefore, this Court should reverse the decision of the Court of Appeals and hold that the school district can be liable for Johnson's alleged negligence in this case on the grounds that whatever discretion he may have exercised in advising the Scotts, that

discretion was professional and not the result of a legislative or judicial function. *Scarpaci, supra.*

The District Had A Ministerial Duty To Provide Non-Negligent Guidance And Counseling

The District admits that Wis. Stat., § 121.02(1)(e) and Wis. Admin. Code P.I. § 8.01(2)(e) obligated it to provide guidance and counseling services to students enrolled in District schools. Wis. Admin. Code P.I. § 8.01(2)(e) states, in relevant part that:

> "Each school district board shall provide a program of guidance and counseling services for all pupils, which meets all of the following requirements:
>
> ...
>
> 4. The program shall provide developmentally appropriate educational, vocational, career, personal and social information to assist pupils in problem solving and in making decisions.
>
> 5. The program **shall** include pupil appraisal, **post-secondary planning, referral, research** and pupil follow-up activities. [Emphasis supplied]."

These legislative and regulatory mandates are meaningless if the District through its licensed professional counselors can, with impunity and without fear of legal recourse, disseminate misleading and erroneous information to the pupils to whom this obligation is owed.

Wis. Stat., § 121.02(1)(e) combined with Wis. Admin. Code P.I. § 8.01(2)(e) created a ministerial duty on the part of the District to create a guidance and counseling program and provide guidance and counseling services for the express purpose of properly advising SPASH students. Assuming this Court continues to apply the broad discretionary act test for determining entitlement to immunity under Sec. 893.80(4), the question becomes whether the giving of accurate advice on whether the Broadcast Communication course was an approved or non-approved NCAA core course involves the exercise of judgment or discretion. *Lodl, supra* at ¶ 21. What judgment or discretion was involved in accurately advising the Scotts on the status of the Broadcast Communication course? All Johnson had to do was pull out the 48-H form sent to SPASH by the NCAA Clearinghouse, look at it and tell the Scotts what was plainly stated on it, namely, that it was "not acceptable." Johnson and the District had the statutory and regulatory duty to provide guidance and counseling services to Ryan Scott on post-secondary planning in a non-negligent manner. This obviously includes the

provision of objectively accurate information on curriculum choices for the purpose of becoming eligible for an NCAA Division I scholarship as well as curriculum choices for securing admittance to any particular institution of higher education.

The Scotts' position makes abundant sense given the present status of the law as reflected in the treatise that gave rise to the ministerial/discretionary duty analysis adopted in *Lister v. Board of Regents*, 72 Wis. 2d 282, 300-301, 240 N.W.2d 610 (1976) as taken from *Meyer v. Carman*, 271 Wis. 329, 332, 73 N.W.2d 514 (1955), namely, 18 McQuillin, Municipal Corporations (3d ed.) § 53.04.25 on the public duty rule. There it is stated:

> "The public duty rule does not protect a municipality where there was a 'special relationship' between a public official and a particular individual that gave rise to a duty to that individual separate from the official's duty to the general public .... **Special duties can be ground in reliance**, dependence, or the creation by the public entity of a known risk. **Courts have identified a variety of criteria which help identify a special relationship. These criteria include the following: direct contact between municipal agents and the plaintiff;** an assumption by the municipality, through promises or actions, of an affirmative duty to act on the plaintiff's behalf; knowledge by the municipal agent that inaction could lead to harm; **the plaintiff's justifiable reliance on the municipal agent,** occurrence of the injury while the plaintiff is under the

> direct control of municipal agents, municipal action that increases the risk of harm, **and the existence of a statute that imposes a duty to a narrow class of individuals rather than to the public at large."** [Emphasis added]

Id. at 166.

Obviously, Ryan Scott and his parents were induced to enter into a trusting relationship with Dave Johnson whereby Johnson specifically agreed to give accurate and proper counseling advice on courses that met the NCAA approved core course curriculum. Given the noted statute and regulation and the specific undertaking made by Johnson under the circumstances, the immunity for legislative or judicial functions simply does not and should not apply.

The Complaint alleges that prior to the time when Mr. Johnson advised the Scotts that the "Broadcast Communication" course was an approved core course under the NCAA guidelines, the SPASH guidance office had received a list from the NCAA Initial Eligibility Clearinghouse which specifically advised all SPASH guidance counselors that the Broadcast Communication course **was not** approved as an NCAA core course. Under the circumstances of this case, Johnson's actions in telling the

Scotts that the Broadcast Communication course was approved as an NCAA core course was a breach of a ministerial duty.

These facts clearly distinguish this case from *Kierstyn* since no statute obligated the District in *Kierstyn* to provide benefit advice for the WRS. Here, the noted statute and regulation specifically obligated the District and Johnson, as a licensed professional guidance counselor, to advise the Scotts on post-secondary planning, referral and research which must include the courses that are necessary to gain admittance to any particular school, qualify for scholarships and meet the NCAA approved core course curriculum.

The Discretionary/Ministerial Act Tests For Determining Entitlement To Legislative, Quasi-Legislative, Judicial And Quasi-Judicial Function Immunity Are Unworkable And Should Be Discarded

As is clear from the history of the legislative, quasi-legislative, judicial and quasi-judicial function immunity language in § 893.80(4), *infra* at pp. 29-35, that immunity was designed and intended by the legislature to apply only to conduct that fell within those governmental functions. *See,*

Holytz, supra at 39-40 citing *Hargrove v. Town of Cocao Beach, Fla.*, 96 So. 2d 130, 133-34 (Fla. 1957), for this language and defining what it was intended to mean and *Dusek, supra*, and *Forseth, supra*. After *Holytz*, the general rule regarding claims against municipalities and their employees was supposed to be liability and the exception was supposed to be immunity. *Linville v. City of Janesville*, 174 Wis. 2d 571, 583-84, 497 N.W.2d 465 (Ct. App. 1993) *aff'd.* 184 Wis. 2d 705, 516 N.W.2d 427 (1994) and *Frostman v. State Farm Mutual Ins. Co.*, 171 Wis. 2d 138, 142, 491 N.W.2d 100 (1992). What was to be the exception, immunity, has, as a result of the expansive construction of "discretionary acts" and limited and narrow construction of "ministerial acts," swallowed the rule.

Recently, this Court stated that § 893.80(4) "confers broad immunity" on municipalities and their officers and employees. *Lodl, supra*, at ¶ 20. A review of the case law in this area readily leads to the conclusion that the judicial analysis has started with the assumption of immunity and then proceeded to eliminate or establish one or more of the so-

called exceptions. *Id.* and cases cited therein: *Kierstyn, supra* and cases cited therein; *Barillari, supra* and cases cited therein; *Linville, supra* and cases cited therein; *Hoskins, supra* and cases cited therein; *Anhalt v. Cities and Villages Mutual Ins. Co.*, 2001 WI App. 271, 249 Wis. 2d 62, 637 N.W.2d 422 (Ct. App. 2001) and cases cited therein; and *Rolland v. County of Milwaukee*, 2001 WI App. 53, 241 Wis. 2d 215, 625 N.W.2d 590 (Ct. App. 2000) and cases cited therein. Where and when did the exception swallow the rule? The Scotts believe the answer is after the *Lifer* case when the court borrowed the discretionary/ministerial act test from the state immunity analysis where the rule is immunity and liability the exception.

Again, the McQuillin commentary is helpful since the discretionary/ministerial act dichotomy was in fact adopted in this state from 18 McQuillin, supra § 53.33 in *Meyer, supra* and subsequently in *Lister, supra*. Now, McQuillin, at § 53.04.10 states:

> "Stating the reasons for the discretionary-ministerial distinction is much easier than stating the rule. . . . **The difference between 'discretionary' and 'ministerial' is artificial. An act is said to be discretionary when the officer must exercise some judgment in**

> **determining whether and how to perform an act. The problem is that 'it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.'" [Emphasis added]**

The McQuillin prediction appears to have come true in *Kimps, supra.* That case, however, arose out of a claim against state employees at UWSP where the rule is immunity and liability is the exception. One was a maintenance employee and the other was a professor. Both failed to check the tightness of a set screw in a volleyball standard used by students in teaching volleyball to grade school kids as part of their curriculum. If tightening a set screw in the sleeve of a volleyball standard so that the pole does not separate from the base and crush someone's foot when it is being wheeled around is a discretionary act, then driving a nail or, for that matter, washing your hands after going to the bathroom could be discretionary acts.

The rules applicable to municipal tort immunity have reverted to the legal quagmire which the Supreme Court in *Holytz* sought to extricate the courts, municipalities and citizens of this state from. The legislature concurred by

specifically adopting the *Holytz* court's preservation of municipal immunity **only for** legislative, quasi-legislative, judicial and quasi-judicial functions as defined in *Hargrove, supra*. Now, like prior to *Holytz*, there are a myriad of potential exceptions to the rule, the application of which is nearly impossible to decipher. Given its "king can do no wrong" origin, the rule has absolutely no justification in modern American society. The *Holytz* court observed:

> **"When the reason for the rule no longer exists, the court's responsibility does not terminate because the legislature through indifference or otherwise is not active. Certainly there can be no justification for the extension of a rule universally criticized as an anachronism without rational basis. It requires but a slight appreciation of the facts to realize that if the individual citizen is left to bear almost all the risk of a defective, negligent, perverse or erroneous administration of the state's functions, an unjust burden will become graver and more frequent as the government's activities are expanded and become more diversified." [Emphasis added]**

Id. at 38.

The present state of this rule has in fact come under extremely severe criticism. Justice Prosser excoriated it in his dissenting opinion in *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, ¶ 60 et. seq., 235 Wis. 2d 409, 438-485, 611 N.W.2d 693 (2000). His dissent was joined in by Justices

Bablitch and Crooks. Judge Sunby did likewise in his concurring opinion in *Walker v. University of Wisconsin Hospitals*, 198 Wis. 2d 237, 251, 542 N.W.2d 207 (Ct. App. 1995).

The Appellate Courts' collective experiences with §893.80(4) immunity cases establishes that the *Holytz* court's observation that allocation of the risk of a defective, negligent, perverse or erroneous administration of a municipality's functions to an individual citizen is unjust and that its prediction that this unjust burden will become graver and more frequent as the government's activities are expanded and become more diversified was right on target. State and local government activities have expanded greatly since 1962 and as a result they have employed a great deal more people. A significant portion of those government employees will be charged with tortuous conduct and the question of immunity will likely arise in each and every one of those cases. Given the liability caps in Wis. Stat., § 893.80(3), the costs of litigating the immunity issue through the courts can easily outweigh the potential recovery. The

societal burden created by immunity is far greater than its benefit. A government that is stated to be of the people, by the people and for the people should, like private citizens and employers, be responsible for tortuous conduct that **can not** truly be characterized as legislative or judicial.

CONCLUSION

High school guidance counselors are in the business of disseminating information. The information that they convey is critical to the future progress and success of the students who rely on them for accurate information. Therefore, in fulfilling their statutory and regulatory duties, they must be held accountable for the dissemination of inaccurate information when the accuracy of that information can be easily, readily and objectively verified by reference to documents available to them.

The Appellate Court erred in affirming the dismissal of the breach of contract claim because it is supported by sufficient consideration. It erred in dismissing the promissory estoppel claim because the Scotts relied on Johnson's promise and the injustice foisted on the Scotts can at least in part be

ameliorated by enforcement of the promise. Finally, the Appellate Court erred in dismissing the Scotts' negligence claim because *Kierstyn, supra* is distinguishable; Johnson's conduct did not involve the exercise of discretion or judgment; Johnson's activities were ministerial; Johnson's activities were professional and non-governmental; and this Court should revise the doctrine of municipal immunity and return it to the status intended by the legislature and this Court's Decision in *Holytz, supra*, namely, liability should be the rule and immunity the exception and immunity should only apply to governmental legislative or judicial functions.

Therefore, the decision of the Court of Appeals should be reversed and the Scotts should be allowed to proceed on all three of their causes of action.

Respectfully submitted this 12th day of December, 2002.

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

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Dated: December 12, 2002.

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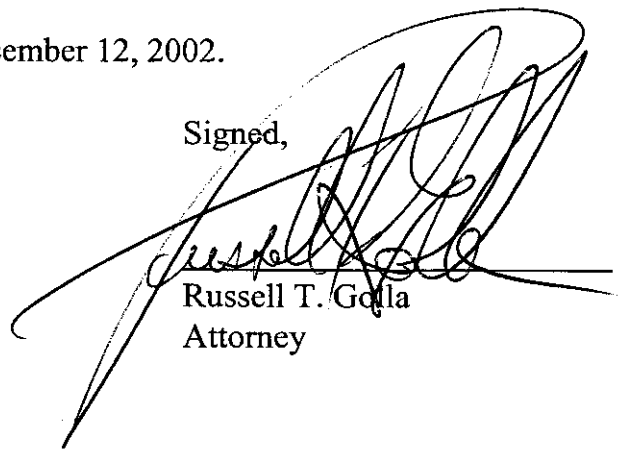

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Attorney

STATE OF WISCONSIN
SUPREME COURT

RYAN SCOTT, KATHY SCOTT,
and PATRICK SCOTT,

Plaintiffs-Appellants-Petitioners,

v. APPEAL NO. 01-2953

SAVERS PROPERTY AND CASUALTY
INSURANCE COMPANY, and
STEVENS POINT AREA PUBLIC
SCHOOL DISTRICT,

Defendants-Respondents,

WAUSAU UNDERWRITERS
INSURANCE COMPANY,

Defendant.

APPEAL FROM THE CIRCUIT COURT OF PORTAGE COUNTY
THE HONORABLE JAMES MASON, PRESIDING
TRIAL COURT CASE NO. 00-CV-286

APPENDIX OF PLAINTIFFS-APPELLANTS-PETITIONERS, RYAN SCOTT, KATHY SCOTT AND PATRICK SCOTT

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COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2953 **Cir. Ct. No. 00-CV-286**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RYAN SCOTT, KATHY SCOTT, AND PATRICK SCOTT,

PLAINTIFFS-APPELLANTS,

V.

SAVERS PROPERTY AND CASUALTY INSURANCE COMPANY,
WAUSAU UNDERWRITERS INSURANCE COMPANY, AND
STEVENS POINT AREA PUBLIC SCHOOL DISTRICT,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Portage County: JAMES MASON, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman, and Lundsten, JJ.

¶1 PER CURIAM. Ryan, Kathy and Patrick Scott appeal from a judgment which dismissed their claims against the Stevens Point Area Public School District and its insurers. For the reasons discussed below, we affirm.

BACKGROUND

¶2 According to the amended complaint, Ryan Scott was a student hockey player at Stevens Point Area Senior High (SPASH). Scott and his parents sought advice from a licensed guidance counselor at the school as to the core course curriculum requirements for NCAA Division I scholarship eligibility. The counselor incorrectly advised the Scotts that a certain Broadcast Communications class would meet the core course requirements. Scott took the course in reliance upon the counselor's advice. He was subsequently offered a full hockey scholarship, which was rescinded when the university discovered that Scott had not met the core English requirements for NCAA Division I scholarship eligibility due to having taken the Broadcast Communications class.

¶3 Scott and his parents attempted to sue the school district under theories of breach of contract, promissory estoppel and negligence, but the trial court dismissed their amended complaint for failure to state a claim upon which relief could be granted. The Scotts appeal.

STANDARD OF REVIEW

¶4 A motion to dismiss a complaint for failure to state a claim upon which relief may be granted tests the legal sufficiency of the pleading. ***Evans v. Cameron***, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985). We independently review the complaint to determine whether, liberally construed, it is quite clear that under no conditions can the plaintiffs recover based upon the facts alleged and inferences reasonably drawn therefrom. ***Bartley v. Thompson***, 198 Wis. 2d 323, 332, 542 N.W.2d 227 (Ct. App. 1995).

ANALYSIS

Breach of Contract Claim

¶5 The Scotts first contend that they had a contract with the school district wherein they agreed to pay property taxes and send Ryan to school in their district and, in exchange, the District agreed to provide guidance counseling services to them. Contract law, however, permits parties to bargain for obligations to one another rather than having obligations based on social interests imposed by law. ***Prent Corp. v. Martek Holdings, Inc.***, 2000 WI App 194 ¶18, 238 Wis. 2d 777, 618 N.W.2d 201. Here, the District was obligated by law to provide certain counseling services once the Scotts unilaterally chose to send Ryan to SPASH. *See* WIS. STAT. § 121.02(1)(e) (1999-2000)[1] and WIS. ADMIN. CODE § PI 8.01(2)(e) (Oct. 2001). This was not a bargained-for exchange of promises between the parties. We conclude that the performance of these legally imposed duties did not constitute consideration sufficient to establish the existence of a contract.

Promissory Estoppel Claim

¶6 The Scotts next assert that the doctrine of promissory estoppel may permit enforcement of a promise that is not supported by sufficient consideration. A cause of action for promissory estoppel lies when: (1) a promise is made which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) the promise actually

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

induces such action or forbearance; and (3) injustice can only be avoided by enforcement of the promise. ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965).

¶7 The District concedes that the facts alleged might support a finding that it "promised" to provide guidance counseling to Ryan. It argues, however, that it was not the District's promise to provide counseling that induced Ryan to take the Broadcast Communications class, but rather the counselor's representation that the Broadcast Communications class would satisfy NCAA scholarship eligibility requirements. We agree. The representation upon which Ryan relied was not in the form of a promise. It merely provided information that turned out to be wrong. Moreover, as the District was not itself the entity in charge of certifying Ryan's eligibility status or granting him the scholarship, judicial enforcement of the alleged promise to provide information would not avoid or remedy any injustice which may have occurred.

Negligence Claim

¶8 The parties do not dispute that the complaint properly stated all of the elements for a negligence claim. They disagree over whether the District was immune from suit.

¶9 WISCONSIN STAT. § 893.80(4) shields municipal entities from liability for injuries resulting from the negligent performance of acts within the scope of their employees' public office. *See* ***Santiago v. Ware***, 205 Wis. 2d 295, 338, 556 N.W.2d 356 (Ct. App. 1996). This governmental immunity doctrine is qualified by several exceptions, however. Immunity is not available: (1) if the conduct was malicious, willful and intentional, *see* ***C.L. v. Olson***, 143 Wis. 2d 701, 711, 422 N.W.2d 614 (1988); (2) if the conduct involved a non-discretionary,

ministerial duty imposed by law, *see* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 300-01, 240 N.W.2d 610 (1976); if there existed a known present danger of such force that the time, mode and occasion for performance left no room for the exercise of judgment, *see* ***Cords v. Anderson***, 80 Wis. 2d 525, 541, 259 N.W.2d 672 (1977); or (4) any discretion involved was non-governmental in nature, *see* ***Scarpaci v. Milwaukee County***, 96 Wis. 2d 663, 686-87, 292 N.W.2d 816 (1980). The Scotts do not contend that the guidance counselor's actions here were malicious or that action was necessary to avoid a known present danger.

¶10 The Scotts argue that if the guidance counselor was legally obligated to advise Scott so as to defeat a contract claim, it follows that he had a ministerial duty to provide accurate information about NCAA scholarship eligibility requirements. We disagree. The fact that a duty may exist does not answer the question whether that duty is ministerial or discretionary in nature. ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 95, 596 N.W.2d 417 (1999). As explained in ***Lister***:

> A public officer's duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.

Lister, 72 Wis. 2d at 301. Here, the counselor's general obligation to provide counseling services did not dictate precisely what advice or information should be given to each student. Rather, the counselor was required to apply the requirements of various institutions to each student's situation. This interpretive process was inherently discretionary in nature. *See* ***Kierstyn***, 228 Wis. 2d at 92 (rejecting argument that "an unambiguous statute creates a ministerial duty"). We conclude that whatever obligation the counselor had to provide information to

Ryan was not ministerial in nature, even if the NCAA scholarship eligibility requirements were themselves clear.

¶11 The Scotts also argue that any discretion the counselor may have exercised was professional rather than governmental in nature. As noted in ***Kierstyn***, however, the professional exception has to date been applied only in the medical context, and the court has on two occasions declined to extend it further. ***Kierstyn***, 228 Wis. 2d at 97-98. While a high school guidance counselor may perform some medical professional functions to the extent he or she engages in psychological analysis of students, the provision of information about scholarship requirements is not among them.

¶12 Finally, the Scotts provide several policy arguments as to why the current state of the law ought to be modified. Such arguments are more properly addressed to the supreme court. We conclude that the trial court properly determined that the Scott's complaint failed to state a claim upon which relief could be granted.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN CIRCUIT COURT PORTAGE COUNTY

RYAN SCOT and KATHY SCOTT and PATRICK SCOTT,

Plaintiffs,

-vs-

ABC INSURANCE COMPANY and STEVENS POINT AREA PUBLIC SCHOOL DISTRICT,

Defendants.

DECISION AND ORDER ON MOTION TO DISMISS

Case No. 00CV286

The claim of plaintiffs, Ryan Scott and his parents Kathy and Patrick Scott, is so similar to the claim of John Kierstyn in Kierstyn v. Racine Unified School District, 228 Wis.2d 81, 596 N.W.2d 417 (1999) that Stevens Point Area Public School District's (SPAPSD) is entitled to the granting of its motion to dismiss.

Ryan Scott is suing SPAPSD on the claim that he received inaccurate advice from a high school guidance counselor who Scott says erred in advising him what course to take in high school to qualify for an NCAA Division I scholarship, and that because of the inaccurate information Scott received he was not qualified for the NCAA scholarship he otherwise would have been offered, and that Scott is thereby precluded from a potential professional hockey career.

John Kierstyn sued the Racine Unified School District (RUSD) on the claim that he received inaccurate advice from a school district benefits specialist who erred in advising him regarding benefits available upon the death of his wife.

In Kierstyn, the trial court granted RUSD's motion for summary judgment; the court of appeals affirmed; and the supreme court issued a decision affirming and explaining its

rationale. Its rationale applies to this case and to the arguments of the parties.

Plaintiff argues that other states have decided cases like Scott's contrary to the outcome Kierstyn dictates. However, Scott's case is too much like Kierstyn for me to rely upon cases from other jurisdictions.

Scotts argue that Kathy and Patrick Scott paid property taxes and that a contract is thereby established with the school district that included the services of the guidance counselor. If this were so, it would lead to a taxpayer suit a minute. Every disgruntled taxpayer could sue over every pothole. Motion to dismiss is appropriate in the case of such a claim.

Plaintiffs argue that Ryan Scott is different from John Kierstyn in that the SPAPSD is obligated by law to educate Ryan Scott, and that it failed in that task. I conclude that this is a distinction without merit. The question is what was SPAPSD's role in providing the erroneous (assuming for the purposes of this motion) advice. The counselor in Scott, like the benefits specialist in Kierstyn, was not statutorily obligated to provide advice. The counselor in Scott, like the counselor in Kierstyn, was not doing a ministerial duty.

Scotts argue that they are entitled to their remedy because Ryan Scott was induced by the guidance counselor into taking a wrong course. The immunity rational of Kierstyn nevertheless applies Scotts' promissory estoppel premise, just as it does to Scotts' negligence claim. The facts giving rise to the claim are the same in either cause of action. Promissory estoppel could've been pled in Kierstyn.

Kierstyn considers the concerns which Scotts raise here, the highway safety cases and the Scarpaci rule, and nevertheless holds that governmental immunity applies. The facts of the Scott case are so similar to those in Kierstyn that I conclude that governmental immunity

applies to the claims stated in the Scotts' complaint, too.

Finally, as to the Scotts' argument that the discretionary/ministerial test is unworkable, I leave that to a higher court or to the legislature.

IT IS ORDERED that Stevens Point Area Public School District's motion to dismiss is granted.

Dated this 27th day of August, 2001.

BY THE COURT:

JAMES MASON
Circuit Judge., Branch 2

STATE OF WISCONSIN CIRCUIT COURT PORTAGE COUNTY

RYAN SCOTT, KATHY and PATRICK SCOTT,

Plaintiffs,

v.

SAVERS PROPERTY AND CASUALTY INSURANCE COMPANY, WAUSAU UNDERWRITERS INSURANCE COMPANY, and STEVENS POINT AREA PUBLIC SCHOOL DISTRICT,

Defendants.

JUDGMENT

Case No. 00-CV-286

The matter of Defendants, Savers Property and Casualty Insurance Company and Stevens Point Area Public School District's Motion to Dismiss having been heard on May 29, 2001, before The Honorable James M. Mason, Circuit Court Judge, Branch II, at the courthouse in the city of Stevens Point, Portage County, Wisconsin; Russell T. Golla of Anderson, Shannon, O'Brien, Rice & Bertz appeared on behalf of Plaintiffs Ryan Scott, Kathy Scott and Patrick Scott; Attorney Cari L. Westerhof of Ruder, Ware & Michler, A Limited Liability S.C., appeared on behalf of Defendants Savers Property and Casualty Insurance Company and Stevens Point Area Public School District and Attorney J. David Rice of Johns, Flaherty & Rice, S.C. appeared on behalf of Defendant Wausau Underwriters Insurance Company.

Based on the evidence presented at the motion hearing, the pleadings and papers on file, the arguments of counsel and

applicable Wisconsin law, the court granted Defendants Savers Property and Casualty Insurance Company and Stevens Point Area Public School District's Motion to Dismiss.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants Savers Property and Casualty Insurance Company and Stevens Point Area Public School District's Motion to Dismiss is granted;

2. Plaintiffs' Complaint is dismissed with prejudice, and without costs to either party.

Dated this 25th day of September, 2001.

By the Court:

Honorable James M. Mason
Circuit Court Judge Branch II

SPASH

Stevens Point Area Senior High

EDUCATIONAL PLANNER

1997-1998

25TH ANNIVERSARY SPASH 1972 1997

Exemplary Recognition
Secondary School Recognition Program 1984-1985
United States Department of Education

EXHIBIT

tabbies

A

The fees listed in this book have been proposed/ projected to cover cost of consumable materials. They are subject to change and school board approval through the 1997-98 budget process.

TABLE OF CONTENTS

INTRODUCTION TO THE SPASH HIGH SCHOOL EDUCATIONAL PLANNER: A GUIDE FOR COURSE SELECTION

Effective course selection is an important part of the process of career planning. But it is hard to make "good" course selections without having some idea of what direction you want to go after high school. Many of the courses a student takes in high school have a direct bearing on options for after high school graduation. One must choose courses that will enhance the chance of being prepared for whatever option is eventually chosen. Effective course selection can also stimulate a person's interest in the learning process.

Parents can provide assistance in course selection and should be aware of recommended coursework for selected options after graduation. The unique perspectives they have about their son/daughter's hobbies, career goals and skills can be helpful and add insight into course selection.

This SPASH course guide, when used along with the SPASH Career Path brochures can enhance the communication between the student, parent and school regarding effective course selection and basic career planning.

Choosing courses is made easier by knowing (or having some idea of) what one wants to do after graduating from high school. Students must begin and continue the process of career exploration to identify possible occupations that match their interests, aptitudes, skills, and work values/temperaments. Once possible careers are identified, educational and vocational goals can be established to help one prepare for a successful transition to a career or advanced education. The more clear one's "goals" are the easier it is to see how certain courses are necessary to reach those goals.

There are specific course recommendations for some options, which if followed, increase the chances of being successful. For example the University of Wisconsin System requires a minimum of 17 academic credits for admission.* Technical colleges recommend or require specific coursework for admission or success in many of their programs. Apprenticeship programs require specific high school coursework depending upon the trade. The military offers career training opportunities with recommendations and/or requirements that relate to high school coursework. Local employers are increasingly asking job applicants to demonstrate specific job related skills as a requirement for employment.

The basic goal of career exploration is not necessarily to select a specific career at this time, but rather to understand what basic options or careers might fit the individual and then to choose coursework which will give them the best preparation to be successful for that option. Start with discussing general ideas about your future with a school counselor to help learn about basic options after graduation. Your school counselor may suggest some computer or paper and pencil activities to help you discover careers that might "fit" your interests, skills, work values, academic achievements, etc. Next, use the SPASH Career Path brochures related to your interests and skills to find SPASH courses that will help you prepare for possible careers you may be considering. The six SPASH Career Path clusters are: (1) Art and Communication; (2) Business and Marketing; (3) Agribusiness/Natural Resources; (4) Industrial Scientific, and Engineering Technology; (5) Health Care; and (6) Service Careers (except health). Finally, use the SPASH High School Educational Planner course guide to read and understand descriptions of required and elective courses. Used together, and with the help of your parents, teachers, and school counselor, these planning tools and suggested activities can answer many questions about your future.

Carefully examine the recommended (required) sequence of courses for the post-high school options listed on page 4.

**Consult the "Introduction to the University of Wisconsin System" brochure for the current year individual campus requirements. This publication is available free each fall school term from your school counselor.*

Each area below students must take basic core curriculum courses plus sufficient electives to satisfy SPASH graduation requirements of 23.5 credits.

COURSE SEQUENCES		
MINIMUM REQUIRED FOR GRADUATION	MINIMUM RECOMMENDED FOR UW-SYSTEM	MINIMUM RECOMMENDED FOR SCHOOL TO WORK/TECH PREP
4 Credits English 1 Credit English 1-2 1 Credit Literature 1 Credit Writing 1/2 Credit Speech 1/2 Credit Elective	4 Credits English* 1 Credit English 1-2 1 Credit Literature 1 Credit Writing 1/2 Credit Speech 1/2 Credit Elective	4 Credits English** 1 Credit English 1-2 1 Credit Literature 1 Credit Writing 1/2 Credit Speech 1/2 Credit Elective
4 Credits Social Studies 1 Credit Civics 1-2 1 Credit U.S. History 1-2 2 Credits Elective	4 Credits Social Studies* 1 Credit Civics 1-2 1 Credit U.S. History 1-2 2 Credits Elective	4 Credits Social Studies** 1 Credit Civics 1-2 1 Credit U.S. History 1-2 2 Credits Electives
2 Credits Math	3 Credits Math* 1 Credit Algebra 1-2 1 Credit Geometry 1-2 1 Credit Algebra 3-4	3 Credits Math** 1 Credit Algebra 1TP 1 Credit Algebra 2TP 1 Credit Geometry
2 Credits Science 1 Credit Science 1-2 1 Credit Biology (Ag/Biology or Food/Biology)	3 Credits Lab Science* 1 Credit Science 1 Credit Biology (Ag/Biology or Food/ Biology) 1-2 Credits Chemistry, Physics, or Advanced Biology	3 Credits Science** 1 Credit Science 1-2 1 Credit Biology (Ag/Biology or Food/Biology) 1 Credit Physics
1 1/2 Credits Physical Education 1/2 Credit Health	1 1/2 Credits Physical Education 1/2 Credit Health	1 1/2 Credits Physical Education 1/2 Credit Health
	2 Credits in ONE Foreign Language* 2 Credits required for ADMISSION at <u>some</u> universities. 2-4 Credits required to graduate from <u>some</u> colleges or programsor recommended as preparation to pass foreign language proficiency exam.	
9 1/2 Credits Electives	2 Credits from other <u>academic</u> elective areas (minimum)* •Fine Arts, Performing Arts, Computer Science •<u>Additional</u> English, Social Studies, Math, Lab Science, or Foreign Language •Other vocational electives •3 1/2 credits of other electives (to satsify SPASH graduation requirements)	7 1/2 credits of electives will satisfy the graduation requirement This will prepare students for tech college admission, while not necessarily restricting students from university admission. It is recommended that students choose as many electives from their vocational interest area as possible.
	*<u>Important!</u> Consult your school counselor to determine specific requirements/ recommendations for the college or university you are thinking of attending!	**<u>Important!</u> Consult your school counselor for specific requirements/recommendations based on the career, or technical college program being considered.

WHERE TO GO FOR HELP
WHATEVER YOU PLAN TO DO

The Student Services/Counseling Office is your best place to start. We offer course advising, reference books and college catalogs, computer search programs, career counseling, scholarship and financial aid information, opportunities to talk with university and vocational-technical college representatives, and years of experience and expertise. Call one of the school counselors below with any questions you might have at 345-5403.

Finally, some good advice - - no matter where you are with your decisions about what to do after high school, we can be of help. However, for anything to get done you must first make the decision to get started.

SPASH School Counselors
Mr. Mitch Fisher
Mr. Dave Johnson
Mrs. June Johnson
Mr. Jeff Meidam
Ms. Arlene Meyerhofer

SELECTING COURSES FOR GRADES 9-12

SPASH GRADUATION REQUIREMENTS

Courses that meet every day for a semester earn 1/2 credit; those that meet for the year will earn one credit. Credit is usually earned on a semester basis and awarded only to courses with passing grades.

To graduate from SPASH all students must earn a minimum of 23 1/2 credits during grades 9-12 and successfully complete all required courses. Those courses and credits are presented below:

4 credits	English	(3 1/2 credits English and 1/2 credit Speech)
4 credits	Social Studies	
2 credits	Math	
2 credits	Science	(one of which must be Biology)
1 1/2 credit	Phy Ed	(Physical Education/Health is required of all students unless they are excused by
1/2 credit	Health	their physician - if excused, the phy ed credit must be made up through other coursework)
9 1/2 credits	Elective Courses	
23 1/2 credits	TOTAL	

NOTE: In addition, ALL students (including those who transfer to SPASH at some point) must pass the ***Language Arts and Math Competency Tests****.*

To complete the 23.5 credits presented above, students must enroll in not fewer than:

6.5	credits as freshmen
6	credits as sophomores
6	credits as juniors
5	credits as seniors

Students can earn high school credits through university or college courses, technical college courses, correspondence study, summer conservation camps and coursework completed abroad. However, that credit will be awarded only through PRIOR WRITTEN APPROVAL of the principal. *(See Modification of High School Program, pages 12-13)*

The next few pages outline the course and credit requirements for each grade. A four year course of study worksheet can be found in each of the SPASH Career Path brochures.

IMPORTANT ACTIVITIES AND DATES FOR CAREER OR EDUCATIONAL PLANNING

GRADE 9-10

_____ Talk to a counselor to get information on options about which you are thinking. Begin to examine all of the options available to you in greater detail. Get to know your school counselor since she/he may be helpful in writing recommendations for college admissions or job applications when you get to be a senior.

_____ Get involved in new activities, clubs, sports or community activities. These may help on job or college applica tions at the time of graduation.

_____ Plan or review tentative course selection for grades 9, 10, 11 and 12 with your school counselor. Make sure that you take the minimum coursework requirements for the option(s) you are considering.

_____ Improve your grades to increase your grade point average (GPA) and rank in class. Rank in class requirements are on the rise for admission to many colleges (UW-System).

_____ Take the Armed Services Vocational Aptitude Battery (ASVAB) to get some information on your vocational aptitudes. There is no obligation to the military by taking the ASVAB and it is the required entrance test for enlisting in any branch of the armed forces. (November-December - Grade 10-12, see your school counselor about how to schedule this exam).

_____ All sophomores will take the Wisconsin Student Assessment System (WSAS) Test in grade 10. The results will give you information on academic achievement in the areas of language usage, math, reading, science, and social studies. A career interest inventory is included with this test. You should review your test results with a school counselor (taken in October with results returned near the end of first semester).

GRADE 11

_____ Using the Wisconsin Career Information System (WCIS) and other career reference materials in the Counseling Office, continue to get information on occupations and educational programs that might interest you.

_____ Register for the Preliminary Scholastic Aptitude Test (PSAT). This test gives you information on how you compare to other college bound students. It is also the source of potential scholarships for college should you do exceptionally well on it. (October)

_____ Take the ASVAB (again, or if you have not already done so) for information on your vocational aptitudes. (November-December)

_____ Write to colleges or technical schools that interest you and request admission and application materials. Many school catalogs are available in the Student Services/Counseling Office.

_____ Review course selection for grade 12 with your school counselor (February/March).

_____ Take the ACT and/or SAT I tests if they are necessary for the schools you are considering or for admission or scholarship. Each is given five times during the year on Saturday mornings. Check the school district calendar for these dates.

_____ Request information on U. S. Military Academy appointments or Reserve Officer Training Corps (ROTC) scholarships. You have to start planning early for these options. Contact these programs/schools no later than 2nd semester to get information on the application process which is quite complicated.

_____ Over the summer begin to put together a resume' of activities that will help you complete college, scholarship or job applications. Have it checked in the "Write Place" when you return to school in the fall. Pick up a copy of the SPASH Scholarship Workbook in the Counseling Office.

ENGLISH DEPARTMENT

COURSE TITLE	DESCRIPTION

COMMUNICATION THEORY
Course: #130A/168B
Credit: 1.0
Duration: Semester
Grade: 10-11-12
Pre: None
Fee: None

Communicaton Theory is an academically rigorous class combining the efforts of the English and business departments.

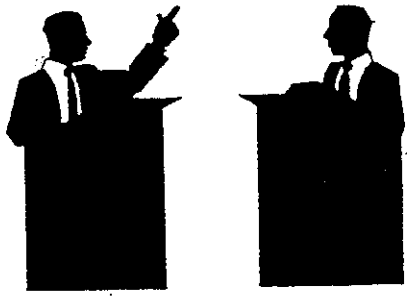
All of the language arts skills will be emphasized: reading, writing, speaking, and listening. Students will become proficient in the areas of interpersonal and professional skills. Problem solving, critical thinking, and decision making techniques will be included in this advanced training class.

Some possible units include communicating with supervisors/co-workers, participating in group activities, following and giving directions, and presenting one's point of view. This activity-oriented approach is designed to appeal to a variety of learning styles, especially to students who are motivated by hands-on instruction. Students write a variety of types of papers including opinion, future, process, and point of view papers. They also complete editing exercises on clarity, conciseness, completeness, and combining. In addition, they develop an employment portfolio which includes an application blank, cover letter, follow-up letter, and interview evaluation.

This semester class will be team-taught by two teachers for two consecutive class periods and will be worth one credit. It satisfies the junior English writing requirement and the speech requirement for graduation.

DEBATE
Course: #170
Credit: .5
Duration: Semester
Grade: 10-11-12
Pre: None

Debate is an advanced speech course open to sophomores, juniors and seniors in lieu of the required speech communication class. Students may elect debate one, two, or three years during their high school career. Offered first semester, debate class coordinates with the interscholastic high school debate season by focusing on persuasion, argumentation, research and communication skills within the context of the high school debate topic. Students are encouraged, but not required, to participate in the extracurricular debate season which finds SPASH debaters traveling throughout the state on weekends from mid September to mid February.



BROADCAST COMMUNICATION
Course: #171
Credit: .5
Duration: Semester
Grade: 11-12
Pre: None

This course provides the creative and active student the unique opportunity to become involved in writing and producing radio and television projects.

Students will write and present their work to listening and viewing audiences with writing technique and style emphasized in all individual and group work.

Broadcast Communication also emphasizes the theory and practice of public speaking through the use of various media. May be taken for more than one semester, with instructor's approval.

NCAA INITIAL-ELIGIBILITY CLEARINGHOUSE

Form 48-H Confirmation

Date: 04/04/96

ED VON FELDT
STEVENS POINT AREA SR HIGH SCH
1201 NORTH POINT DRIVE
STEVENS POINT, WI 54481

School Code: 502-195
District:
School Type: PUBLIC
Telephone: (715)345-5403
Fax: (715)345-5408

Academic Year: 1995-96
Version: F
Enrollment: 2151

Basis of your calendar year: SEMESTER
Date of Graduation: 05/28/96
Grading System: STANDARD

The NCAA Initial-Eligibility Clearinghouse has approved the following courses for use in establishing the certification status of student-athletes from this school. NCAA regulations require each core course's content to be distinct. Therefore, all courses must contain material which is at least 75% unique from all other courses which a student-athlete wishes to use in certifying eligibility. Division I mathematics requirements for students attending college after August 1, 1996, stipulate at least one unit of mathematics must be at level 2. A level 2 mathematics core course is defined as geometry or a course for which geometry is a pre-requisite.

Please review all of the information at the top of this form and the courses listed below to verify accuracy and completeness. Make sure the titles of courses listed here match the terminology which your school utilizes on official high school transcripts. If any corrections are needed, note them in red ink directly on this document. Read the directions and sign the signature statement, return this form and any needed documentation to the Clearinghouse. Be sure to include your school's next scheduled graduation date. If all information is correct, keep this copy for your files.

ENGLISH
AMERICAN LITERATURE
CREATIVE EXPRESSION (WRTNG)
DEBATE
DRAMA
ENG. 1-2/COMMUNICATIONS
ENGLISH LITERATURE
EXPLORING LITERATURE
FOC. ON LITERATURE
FOC. ON LITERATURE A
FOCUS ON WRITING
INTRODUCTION TO ENGLISH
JOURNALISM
MODERN LITERATURE
PEOPLE IN LITERATURE
SHAKESPEARE
SPEECH
SPEECH/ADV
TEAMS LANG ARTS (JR. YR)
TEAMS SENIOR SEMINAR/ENG
TEAMS SOPHOMORE ENGLISH
WORLD LITERATURE
WRITERS WORKSHOP 1
WRITERS WORKSHOP 2
WRITING UNLIMITED

MATHEMATICS
(AP) CALCULUS (Level 2)
ALGEBRA 1 TP (Level 1)
ALGEBRA 1-2 (Level 1)
ALGEBRA 2 TP (Level 1)
ALGEBRA 3-4 (Level 2)
ALGEBRA 3A-4A (ACCEL) (Level 2)
ALGEBRA 5-6 (Level 2)
ALGEBRA 5A-6A (ACCEL) (Level 2)
ELEM. ALGEBRA 1 (Level 1)
ELEM. ALGEBRA 2 (Level 1)
GEOMETRY 1-2 (Level 2)
GEOMETRY 1A-2A (ACCEL) (Level 2)
TEAMS GEOMETRY (Level 2)

SOCIAL SCIENCE
(AP) GOVT & POLITICS: COMPARATIVE
(AP) GOVT & POLITICS: US

SOCIAL SCIENCE, CONTINUED
(AP) PSYCHOLOGY
(AP) U.S. HISTORY 1-2
AFRO-AMERICAN HISTORY
AMERICAN FOREIGN POLICY
ANCIENT CIVILIZATIONS
APPLIED ECONOMICS
CIVIC 1-2
ECON. (AP) MACRO
ECON. (AP) MICRO
HISTORY OF GREAT IDEAS
HOLOCAUST
MODERN EUROPEAN HISTORY
NATIVE AMERICAN HISTORY
POLAND: YESTERDAY/TODAY
POLITICAL HISTORY/U.S.
PSYCHOLOGY
SOC. PROBLEMS
TEAMS SENIOR SEMINAR/SOC SCI
TEAMS SOCIOLOGY
TEAMS US HISTORY
THE COLD WAR: A STUDY IN INTNL CONFLICT
U.S. HIST. 1-2
U.S., ASIA AND MIDDLE EAST
WISCONSIN HISTORY
WORLD GEOGRAPHY 1
WORLD GEOGRAPHY 2

NATURAL/PHYSICAL SCIENCE
ASTRONOMY
BIOLOGICAL CONSERVATION
BIOLOGY 1-2 (LAB)
BIOLOGY 3-4 (LAB)
CHEMISTRY 1-2 (LAB)
CHEMISTRY 1A-2A (ACCEL) (LAB)
CHEMISTRY 3 (LAB)
GEOLOGY
PHYSICS 1-2 (LAB)
PHYSICS 3 (LAB)
SCIENCE 1-2/SCIENCE TECH. (LAB)
SCIENCE 1A-2A (ACCEL) (LAB)
TEAMS BIOLOGY
TEAMS ENVIRONMENTAL STUDIES

connect

EXHIBIT

Tabbies

Form 48-H Confirmation (side 2) Date: 04/04/96

School Code: 502-195

Approved Course, continued

ADDITIONAL CORE COURSE	ADDITIONAL CORE COURSE, CONTINUED
COMPUTER LANGUAGES: "C" PROGRAMMING	GERMAN 2
COMPUTER LANGUAGES: ADV. BASIC	GERMAN 3
COMPUTER LANGUAGES: ADV. PASCAL	GERMAN 4
COMPUTER LANGUAGES: BASIC	GERMAN 5
COMPUTER LANGUAGES: COBOL	RUSSIAN 1
COMPUTER LANGUAGES: FORTRAN	RUSSIAN 2
COMPUTER LANGUAGES: LOGO	SPANISH 1
COMPUTER LANGUAGES: PASCAL	SPANISH 2
FRENCH 1	SPANISH 3
FRENCH 2	SPANISH 4
FRENCH 3	SPANISH 5
FRENCH 4	
FRENCH 5	
GERMAN 1	

NON-CORE COURSES: If any courses listed on this form have not been approved by the Clearinghouse as meeting NCAA core course requirements, these courses are listed below. Please read the information for each category listed.

NOT ACCEPTABLE. The following course(s) do not qualify as NCAA course(s) and therefore cannot be used for NCAA initial-eligibility certification.

BROADCAST COMMUNICATION
MONEY MANAGEMENT
SEMINAR IN LEADERSHIP

CHANGED DEFINITION. The acceptability of the course(s) listed below has changed effective with the 1993-94 academic year.
- A course marked with a '#' is acceptable if taken prior to 1993-94 but not acceptable effective with that academic year.
- A course marked with a '?' is acceptable if taken prior to 1993-94 and may continue to be acceptable; however, additional information is required to make a final determination. If you wish to have the Clearinghouse consider any '?' course(s) for current acceptability, please submit the following for each course: 1) a complete course description, 2) a course syllabus, and 3) a copy of the table of contents of all assigned text books.

#-COMPUTERS: SPECIAL TOPICS
#-EXP. COMPUTERS/COMPUTER APP..

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DIRECTIONS: If no corrections are needed, it is not necessary to sign and return this form. If any corrections are needed, mark them in red ink. If additional information was requested for non-core courses, enclose it; sign the statement below, and send this signed 48-H Confirmation and all pages to:

NCAA Clearinghouse
2255 North Dubuque Road
P.O. Box 4044
Iowa City, IA 52243-4044

Fax: 319/337-1556 (Important, see NOTE below)

SIGNATURE: I certify that the courses listed in this form, including any corrections, accurately reflect core courses offered at this high school. If additional information is enclosed about courses, I certify that the information is accurate and complete.

Signature of Principal or Authorized School Official Date Telephone Number

NOTE: While the Clearinghouse can accept Form 48-H via fax, Student Transcripts MUST be mailed.

NCAA INITIAL-ELIGIBILITY CLEARINGHOUSE

Date: 01/30/97

Form 48-H Confirmation

ED VON FELDT
STEVENS POINT AREA SR HIGH SCH
1201 NORTH POINT DRIVE
STEVENS POINT, WI 54481

School Code: 502-195
District:
School Type: PUBLIC
Telephone: (715)345-5403
Fax: (715)345-5408

Academic Year: 1996
Version: F
Enrollment: 2151

Basis of your calendar year: SEMESTER
Date of Graduation: 05/28/97
Grading System: STANDARD

The NCAA Initial-Eligibility Clearinghouse has approved the following courses for use in establishing the certification status of student-athletes from this school. NCAA regulations require each core course's content to be distinct. Therefore, all courses must contain material which is at least 75% unique from all other courses which a student-athlete wishes to use in certifying eligibility. Division I mathematics requirements for students attending college after August 1, 1996, stipulate at least one unit of mathematics must be at level 2. A level 2 mathematics core course is defined as geometry or a course for which geometry is a pre-requisite.

Please review all of the information at the top of this form and the courses listed below to verify accuracy and completeness. Make sure the titles of courses listed here match the terminology which your school utilizes on official high school transcripts. If any corrections are needed, note them in red ink directly on this document. Read the directions and sign the signature statement, return this form and any needed documentation to the Clearinghouse. Be sure to include your school's next scheduled graduation date. If all information is correct, keep this copy for your files.

ENGLISH
AMERICAN LITERATURE
CREATIVE EXPRESSION (WRTNG)
DEBATE
DRAMA
ENG. 1-2/COMMUNICATIONS
ENGLISH LITERATURE
EXPLORING LITERATURE
FOC. ON LITERATURE
FOC. ON LITERATURE A
FOCUS ON WRITING
INTRODUCTION TO ENGLISH
JOURNALISM
MODERN LITERATURE
PEOPLE IN LITERATURE
SHAKESPEARE
SPEECH
SPEECH/ADV
TEAMS LANG ARTS (JR. YR)
TEAMS SENIOR SEMINAR/ENG
TEAMS SOPHOMORE ENGLISH
WORLD LITERATURE
WRITERS WORKSHOP 1
WRITERS WORKSHOP 2
WRITING UNLIMITED

MATHEMATICS
(AP) CALCULUS (Level 2)
ALGEBRA 1 TP (Level 1)
ALGEBRA 1-2 (Level 1)
ALGEBRA 2 TP (Level 1)
ALGEBRA 3-4 (Level 2)
ALGEBRA 3A-4A (ACCEL) (Level 2)
ALGEBRA 5-6 (Level 2)
ALGEBRA 5A-6A (ACCEL) (Level 2)
ELEM. ALGEBRA 1 (Level 1)
ELEM. ALGEBRA 2 (Level 1)
GEOMETRY 1-2 (Level 2)
GEOMETRY 1A-2A (ACCEL) (Level 2)
TEAMS GEOMETRY (Level 2)

SOCIAL SCIENCE
(AP) GOVT & POLITICS: COMPARATIVE
(AP) GOVT & POLITICS: US

SOCIAL SCIENCE, CONTINUED
(AP) PSYCHOLOGY
(AP) U.S. HISTORY 1-2
AFRO-AMERICAN HISTORY
AMERICAN FOREIGN POLICY
ANCIENT CIVILIZATIONS
APPLIED ECONOMICS
CIVIC 1-2
ECON. (AP) MACRO
ECON. (AP) MICRO
HISTORY OF GREAT IDEAS
HOLOCAUST
MODERN EUROPEAN HISTORY
NATIVE AMERICAN HISTORY
POLAND: YESTERDAY/TODAY
POLITICAL HISTORY/U.S.
PSYCHOLOGY
SOC. PROBLEMS
TEAMS SENIOR SEMINAR/SOC SCI
TEAMS SOCIOLOGY
TEAMS US HISTORY
THE COLD WAR: A STUDY IN INTNL CONFLICT
U.S. HIST. 1-2
U.S., ASIA AND MIDDLE EAST
WISCONSIN HISTORY
WORLD GEOGRAPHY 1
WORLD GEOGRAPHY 2

NATURAL/PHYSICAL SCIENCE
ASTRONOMY
BIOLOGICAL CONSERVATION
BIOLOGY 1-2 (LAB)
BIOLOGY 3-4 (LAB)
CHEMISTRY 1-2 (LAB)
CHEMISTRY 1A-2A (ACCEL) (LAB)
CHEMISTRY 3 (LAB)
ENVIRON SCIENCE/AVE (SCIENCE 1-2)
GEOLOGY
PHYSICAL SCIENCE/AVE (SCIENCE 1-2)
PHYSICS 1-2 (LAB)
PHYSICS 3 (LAB)
SCIENCE 1-2/SCIENCE TECH. (LAB)
SCIENCE 1A-2A (ACCEL) (LAB)
TEAMS BIOLOGY

Form 48-H Confirmation (side 2) Date: 01/30/97

School Code: 502-1

Approved Course, continued

NATURAL/PHYSICAL SCIENCE, CONTINUED
TEAMS ENVIRONMENTAL STUDIES

ADDITIONAL CORE COURSE
COMPUTER LANGUAGES: "C" PROGRAMMING
COMPUTER LANGUAGES: ADV. BASIC
COMPUTER LANGUAGES: ADV. PASCAL
COMPUTER LANGUAGES: BASIC
COMPUTER LANGUAGES: COBOL
COMPUTER LANGUAGES: FORTRAN
COMPUTER LANGUAGES: LOGO
COMPUTER LANGUAGES: PASCAL
FRENCH 1
FRENCH 2
FRENCH 3
FRENCH 4
FRENCH 5

ADDITIONAL CORE COURSE, CONTINUED
GERMAN 1
GERMAN 2
GERMAN 3
GERMAN 4
GERMAN 5
RUSSIAN 1
RUSSIAN 2
SPANISH 1
SPANISH 2
SPANISH 3
SPANISH 4
SPANISH 5

NON-CORE COURSES: If any courses listed on this form have not been approved by the Clearinghouse as meeting NCAA core course requirements, these courses are listed below. Please read the information for each category listed.

NOT ACCEPTABLE. The following course(s) do not qualify as NCAA course(s) and therefore cannot be used for NCAA initial-eligibility certification.

BROADCAST COMMUNICATION
MONEY MANAGEMENT
SEMINAR IN LEADERSHIP

CHANGED DEFINITION. The acceptability of the course(s) listed below has changed effective with the 1993-94 academic year.
- A course marked with a '#' is acceptable if taken prior to 1993-94 but not acceptable effective with that academic year.
- A course marked with a '?' is acceptable if taken prior to 1993-94 and may continue to be acceptable; however, additional information is required to make a final determination. If you wish to have the Clearinghouse consider any '?' course(s) for current acceptability, please submit the following for each course: 1) a complete course description, 2) a course syllabus, and 3) a copy of the table of contents of all assigned text books.

#-COMPUTERS: SPECIAL TOPICS
#-EXP. COMPUTERS/COMPUTER APP..

++

DIRECTIONS: If no corrections are needed, it is not necessary to sign and return this form. If any corrections are needed, mark them in red ink. If additional information was requested for non-core courses, enclose it; sign the statement below, and send this signed 48-H Confirmation and all pages to:

NCAA Clearinghouse
2255 North Dubuque Road
P.O. Box 4044
Iowa City, IA 52243-4044

Fax: 319/337-1556 (Important, see NOTE below)

SIGNATURE: I certify that the courses listed in this form, including any corrections, accurately reflect core courses offered at this high school. If additional information is enclosed about courses, I certify that the information is accurate and complete.

Signature of Principal or Authorized School Official	Date	Telephone Number

NOTE: While the Clearinghouse can accept Form 48-H via fax, Student Transcripts MUST be mailed.

NCAA INITIAL-ELIGIBILITY CLEARINGHOUSE

Date: 07/31/97

Form 48-H Confirmation

ED VON FELDT
STEVENS POINT AREA SR HIGH SCH
1201 NORTH POINT DRIVE
STEVENS POINT, WI 54481

School Code: 502-195
District:
School Type: PUBLIC
Telephone: (715)345-5403
Fax: (715)345-5408

Academic Year: 1997
Version: H
Enrollment: 2151

Basis of your calendar year: SEMESTER
Date of Graduation: 05/24/98
Grading System: STANDARD

The NCAA Initial-Eligibility Clearinghouse has approved the following courses for use in establishing the certification status of student-athletes from this school. NCAA regulations require each core course's content to be distinct. Therefore, all courses must contain material which is at least 75% unique from all other courses which a student-athlete wishes to use in certifying eligibility. Division I mathematics requirements for students attending college after August 1, 1996, stipulate at least one unit of mathematics must be at level 2. A level 2 mathematics core course is defined as geometry or a course for which geometry is a pre-requisite.

Please review all of the information at the top of this form and the courses listed below to verify accuracy and completeness. Make sure the titles of courses listed here match the terminology which your school utilizes on official high school transcripts, note title changes in red ink directly on this document. Read the directions and sign the signature statement, return this form and any Core Course Review Sheets to the Clearinghouse. Be sure to include your school's next scheduled graduation date. If all information is correct, keep this copy for your files.

ENGLISH
AMERICAN LITERATURE
CREATIVE EXPRESSION (WRTNG)
DEBATE
DRAMA
ENG. 1-2/COMMUNICATIONS
ENGLISH LITERATURE
EXPLORING LITERATURE
FOC. ON LITERATURE
FOC. ON LITERATURE A
FOCUS ON WRITING
INTRODUCTION TO ENGLISH
JOURNALISM
MODERN LITERATURE
PEOPLE IN LITERATURE
SHAKESPEARE
SPEECH
SPEECH/ADV
TEAMS LANG ARTS (JR. YR)
TEAMS SENIOR SEMINAR/ENG
TEAMS SOPHOMORE ENGLISH
WORLD LITERATURE
WRITERS WORKSHOP 1
WRITERS WORKSHOP 2
WRITING UNLIMITED

MATHEMATICS
(AP) CALCULUS (Level 2)
ALGEBRA 1 TP (.5 CR/YR MAX) (Level 1)
ALGEBRA 1-2 (Level 1)
ALGEBRA 2 TP (.5 CR/YR MAX) (Level 1)
ALGEBRA 3-4 (Level 2)
ALGEBRA 3A-4A (ACCEL) (Level 2)
ALGEBRA 5-6 (Level 2)
ALGEBRA 5A-6A (ACCEL) (Level 2)
ELEM. ALGEBRA 1 (Level 1)
ELEM. ALGEBRA 2 (Level 1)
GEOMETRY 1-2 (Level 2)
GEOMETRY 1A-2A (ACCEL) (Level 2)
PRE-CALCULUS (Level 2)
TEAMS GEOMETRY (Level 2)

SOCIAL SCIENCE
(AP) GOVT & POLITICS: COMPARATIVE
(AP) GOVT & POLITICS: US

SOCIAL SCIENCE, CONTINUED
(AP) PSYCHOLOGY
(AP) U.S. HISTORY 1-2
AFRO-AMERICAN HISTORY
AMERICAN FOREIGN POLICY
ANCIENT CIVILIZATIONS
APPLIED ECONOMICS
CIVIC 1-2
ECON. (AP) MACRO
ECON. (AP) MICRO
GLOBAL CIVILIZATIONS ART & HISTORY
HISTORY OF GREAT IDEAS
HOLOCAUST
MODERN EUROPEAN HISTORY
NATIVE AMERICAN HISTORY
POLAND: YESTERDAY/TODAY
POLITICAL HISTORY/U.S.
PSYCHOLOGY
SOC. PROBLEMS
TEAMS SENIOR SEMINAR/SOC SCI
TEAMS SOCIOLOGY
TEAMS US HISTORY
THE COLD WAR: A STUDY IN INTNL CONFLICT
U.S. HIST. 1-2
U.S., ASIA AND MIDDLE EAST
WISCONSIN HISTORY
WORLD GEOGRAPHY 1
WORLD GEOGRAPHY 2

NATURAL/PHYSICAL SCIENCE
ASTRONOMY
BIOLOGICAL CONSERVATION
BIOLOGY 1-2 (LAB)
BIOLOGY 3-4 (LAB)
CHEMISTRY 1-2 (LAB)
CHEMISTRY 1A-2A (ACCEL) (LAB)
CHEMISTRY 3 (LAB)
ENVIRON SCIENCE/AVE (SCIENCE 1-2)
GEOLOGY
PHYSICAL SCIENCE/AVE (SCIENCE 1-2)
PHYSICS 1-2 (LAB)
PHYSICS 3 (LAB)
SCIENCE 1-2/SCIENCE TECH. (LAB)
SCIENCE 1A-2A (ACCEL) (LAB)
TEAMS BIOLOGY

Form 48-H Confirmation (side 2) Date: 07/31/97

Approved Course, continued

School Code: 502

NATURAL/PHYSICAL SCIENCE, CONTINUED
TEAMS ENVIRONMENTAL STUDIES

ADDITIONAL CORE COURSE
COMPUTER LANGUAGES: "C" PROGRAMMING
COMPUTER LANGUAGES: ADV. BASIC
COMPUTER LANGUAGES: ADV. PASCAL
COMPUTER LANGUAGES: BASIC
COMPUTER LANGUAGES: COBOL
COMPUTER LANGUAGES: FORTRAN
COMPUTER LANGUAGES: LOGO
COMPUTER LANGUAGES: PASCAL
FRENCH 1
FRENCH 2
FRENCH 3
FRENCH 4
FRENCH 5

ADDITIONAL CORE COURSE, CONTINUED
GERMAN 1
GERMAN 2
GERMAN 3
GERMAN 4
GERMAN 5
RUSSIAN 1
RUSSIAN 2
RUSSIAN 3
SPANISH 1
SPANISH 2
SPANISH 3
SPANISH 4
SPANISH 5

NON-CORE COURSES: If any courses listed on this form have not been approved by the Clearinghouse as meeting NCAA core course requirements, these courses are listed below. Please read the information for each category listed.

NOT ACCEPTABLE. The following course(s) do not qualify as NCAA course(s) and therefore cannot be used for NCAA initial-eligibility certification.

BROADCAST COMMUNICATION
MONEY MANAGEMENT
SEMINAR IN LEADERSHIP

CHANGED DEFINITION. The acceptability of the course(s) listed below has changed effective with the 1993-94 academic year.
- A course marked with a '#' is acceptable if taken prior to 1993-94 but not acceptable effective with that academic year.
- A course marked with a '?' is acceptable if taken prior to 1993-94 and may continue to be acceptable; however, additional information is required to make a final determination. If you wish to have the Clearinghouse consider any '?' course(s) for current acceptability, please submit the appropriate Core Course Review Sheet by academic category (e.g., English, math, science etc.).

#-COMPUTERS: SPECIAL TOPICS
#-EXP. COMPUTERS/COMPUTER APP..

++

DIRECTIONS: If no corrections are needed, it is not necessary to sign and return this form. If any corrections are needed, mark them in red ink. If additional information was requested for non-core courses, send the appropriate Core Course Review Sheets to the address on the form.

NCAA Clearinghouse
2255 North Dubuque Road
P.O. Box 4044
Iowa City, IA 52243-4044

Fax: 319/337-1556 (Important, see NOTE below)

SIGNATURE: I certify that the courses listed in this form, including any corrections, accurately reflect core courses offered at this high school. If additional information is enclosed about courses, I certify that the information is accurate and complete.

Signature of Principal or Authorized School Official Date Telephone Number

NOTE: The Clearinghouse can accept Form 48-H via fax.
Core Course Review Sheets and students transcripts MUST be mailed.

NCAA INITIAL-ELIGIBILITY CLEARINGHOUSE

Confirmation (Formerly Form 48-H)
NCAA Approved Core Courses for Initial Eligibility

Date: 04/21/98

ED VON FELDT
STEVENS POINT AREA SR HIGH SCHI
1201 NORTH POINT DRIVE
STEVENS POINT, WI 54481

School Code: 502-195
District: N/A
School Type: PUBLIC
Telephone: (715) 345-5403
Fax: (715) 345-5408

Academic Year: 1998-99
Version: 1
Enrollment: 2151

Basis of your calendar year: SEMESTER
Date of Graduation: 05/30/99
Grading System: STANDARD

The NCAAhas approved the following courses for use in establishing the initial-eligibility certification status of student-athletes from this school. Some course titles may begin with one of the following prefixes. These prefixes are defined as follows:

- = Only students who have received proper NCAA approval for their diagnosed learning disability may receive credit for these approved courses.
- @ A student will receive no more than one Level 1 NCAA mathematics credit for the successful completion of all courses so noted.
- @@ A student will receive no more than one Level 2 NCAA mathematics credit for the successful completion of all courses so noted.
- @@@ A student will receive no more than one Level 1 and one Level 2 mathematics credit for the successful completion of all courses so noted.
- ! A student will receive no more than one Level 1 NCAA mathematics credit for the sccessful completion of any two courses so noted.
- !! A student will receive NCAA mathematics credit according to the unique credit values noted.
- > A student will receive no more than one unit of NCAA natural/physical science credit for the successful completion of all courses so noted.
- >> A student will receive no more than one and one-half units of NCAA natural/physical science credit for the successful completion of all courses so noted.
- >>> A student will receive no more than two units of NCAA natural/physical science credit for the successful completion of all courses so noted.

NCAA legislation requires that each core-courses's content be distinct in order for a student to receive NCAA credit for the course. Therefore, all courses must contain material which is at least 75% unique from all other courses which a student wishes to use in certifying eligibility.
Please review all of the information at the top of this form and the courses listed below to verify accuracy and completeness. Also, please make sure the titles of courses listed here match the exact terminology which your school utilizes on official high school transcripts.

NCAA APPROVED CORE COURSES

ENGLISH
AMERICAN LITERATURE
CREATIVE EXPRESSION (WRITING)
DEBATE
DRAMA
ENG. 1-2/COMMUNICATIONS
ENGLISH LITERATURE
EXPLORING LITERATURE
FOC. ON LITERATURE
FOC. ON LITERATURE A
FOCUS ON WRITING
INTRODUCTION TO ENGLISH
JOURNALISM
MODERN LITERATURE
PEOPLE IN LITERATURE
SHAKESPEARE
SPEECH COMMUNICATIONS
SPEECH/ADV
TEAMS LANG ARTS (JR. YR)
TEAMS SENIOR SEMINAR/ENG
TEAMS SOPHOMORE ENGLISH
WORLD LITERATURE
WRITERS WORKSHOP 1
WRITERS WORKSHOP 2
WRITING UNLIMITED

MATHEMATICS
(AP) CALCULUS (Level 1)
ALGEBRA 1 TP (.5 CR/YR MAX) (Level 1)
ALGEBRA 1-2 (Level 1)
ALGEBRA 2 TP (.5 CR/YR MAX) (Level 1)
ALGEBRA 3-4 (Level 2)
ALGEBRA 3A-4A (ACCEL) (Level 2)
ALGEBRA 5-6 (Level 2)
ALGEBRA 5A-6A (ACCEL) (Level 2)
ELEM. ALGEBRA 1 (Level 1)
ELEM. ALGEBRA 2 (Level 1)
GEOMETRY 1-2 (Level 2)
GEOMETRY 1A-2A (ACCEL) (Level 2)
PRE-CALCULUS (Level 2)
TEAMS GEOMETRY (Level 2)

SOCIAL SCIENCE
(AP) GOVT & POLITICS: COMPARATIVE
(AP) GOVT & POLITICS: US
(AP) PSYCHOLOGY
(AP) U.S. HISTORY 1-2
=HISTORY 1B-2B
AFRO-AMERICAN HISTORY
AMERICAN FOREIGN POLICY
ANCIENT CIVILIZATIONS
APPLIED ECONOMICS
CIVICS 1-2
ECON. (AP) MACRO

EXHIBIT

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Approved Course. continued

SOCIAL SCIENCE, CONTINUED
ECON. (AP) MICRO
GLOBAL CIVILIZATIONS ART & HISTORY
HISTORY OF GREAT IDEAS
HOLOCAUST
MODERN EUROPEAN HISTORY
NATIVE AMERICAN HISTORY
POLAND: YESTERDAY/TODAY
POLITICAL HISTORY/U.S.
PSYCHOLOGY
SOC. PROBLEMS
TEAMS SENIOR SEMINAR/S OC SCI
TEAMS SOCIOLOGY
TEAMS US HISTORY
THE COLD WAR: A STUDY IN INTNL CONFLICT
U.S. HIST. 1-2
U.S., ASIA AND MIDDLE EAST
WISCONSIN HISTORY
WORLD GEOGRAPHY 1
WORLD GEOGRAPHY 2

NATURAL/PHYSICAL SCIENCE
=BIOLOGY 1C-2C
ASTRONOMY
BIOLOGICAL CONSERVATION
BIOLOGY 1-2 (LAB)
BIOLOGY 3-4 (LAB)
BIOTECHNOLOGY
CHEMISTRY 1-2 (LAB)
CHEMISTRY 1A-2A (ACCEL) (LAB)
CHEMISTRY 1B
CHEMISTRY 3 (LAB)
ENVIRON SCIENCE/AVE (SCIENCE 1-2)
GEOLOGY
PHYSICAL SCIENCE/AVE (SCIENCE 1-2)
PHYSICS 1-2 (LAB)
PHYSICS 3 (LAB)
SCIENCE 1-2/SCIENCE TECH. (LAB)
SCIENCE 1A-2A (ACCEL) (LAB)

NATURAL/PHYSICAL SCIENCE, CONTINUED
TEAMS BIOLOGY
TEAMS ENVIRONMENTAL STUDIES

ADDITIONAL CORE COURSE
COMPUTER LANGUAGES: "C" PROGRAMMING
COMPUTER LANGUAGES: ADV. BASIC
COMPUTER LANGUAGES: ADV. PASCAL
COMPUTER LANGUAGES: BASIC
COMPUTER LANGUAGES: COBOL
COMPUTER LANGUAGES: FORTRAN
COMPUTER LANGUAGES: PASCAL
FRENCH 1
FRENCH 2
FRENCH 3
FRENCH 4
FRENCH 5
FRENCH 5/AP
GERMAN 1
GERMAN 2
GERMAN 3
GERMAN 4
GERMAN 5
GERMAN 5/AP
HYPERLOGO
PROGRAMMING C++
RUSSIAN 1
RUSSIAN 2
RUSSIAN 3
SPANISH 1
SPANISH 2
SPANISH 3
SPANISH 4
SPANISH 5
SPANISH 5/AP

NON-CORE COURSES

NOT ACCEPTABLE: The following course(s) do not qualify as NCAA course(s) and therefore cannot be used for NCAA initial-eligibility certification.

BROADCAST COMMUNICATION
MONEY MANAGEMENT
SEMINAR IN LEADERSHIP
COMPUTERS: SPECIAL TOPICS
EXP. COMPUTERS/COMPUTER APP.

STATE OF WISCONSIN
SUPREME COURT

RYAN SCOTT, KATHY SCOTT, and
PATRICK SCOTT,

Plaintiffs-Appellants-Petitioners,

v.

SAVERS PROPERTY AND CASUALTY
INSURANCE COMPANY, and STEVENS POINT AREA
PUBLIC SCHOOL DISTRICT,

Defendants-Respondents,

WAUSAU UNDERWRITERS INSURANCE COMPANY,

Defendant.

Circuit Court Case No.
00-CV-286

APPEAL NO. 01-2953

APPEAL FROM THE CIRCUIT COURT OF PORTAGE COUNTY
THE HONORABLE JAMES MASON, PRESIDING
TRIAL COURT CASE NO. 00-CV-286

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS SAVERS PROPERTY AND CASUALTY INSURANCE COMPANY AND STEVENS POINT AREA PUBLIC SCHOOL DISTRICT

CARI L. WESTERHOF
State Bar No. 1020896

RUDER, WARE & MICHLER, L.L.S.C.
500 Third Street, Suite 700
P.O. Box 8050
Wausau, WI 54402-8050
Telephone: (715) 845-4336
Fax: (715) 845-2718

Attorneys for Defendants-Respondents, Savers Property and Casualty Insurance Company, and Stevens Point Area Public School District

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CODES

OTHER

STATEMENT OF THE ISSUES

1. Was an enforceable contract created when a Stevens Point Area School District guidance counselor allegedly agreed to assist Ryan Scott in selecting classes approved by NCAA?

   Answered by the trial court and the appellate court in the negative.

2. Does application of the doctrine of promissory estoppel expose the School District to potential liability for giving students bad advice in response to requests for advice?

   Answered by the trial court and the appellate court in the negative.

3. Is a high school guidance counselor performing a discretionary duty when he or she provides guidance counseling services and thus immune from liability under Wis. Stat. § 893.80(4) for giving bad advice?

   Answered by the trial court and the appellate court in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Stevens Point Area Public School District and Savers Property and Casualty Insurance Company ("the District") agree with the Scotts that oral argument may be helpful to the Court and welcomes the opportunity to orally address any matters or issues that the Court deems warrant further discussion.

With regard to publication, the District submits that the contract and promissory estoppel issues involve the application of well-settled legal principles to the particular facts of this controversy and that the exceptions to governmental immunity have been addressed by Wisconsin appellate courts in four cases over the past four years alone. Those decisions, as well as prior precedent, are clear. If precedent is followed, the District believes publication would be unnecessary.

STATEMENT OF THE CASE

The Scotts allege that they asked a guidance counselor employed by the Stevens Point Area Public School District ("the District") to help Ryan Scott select classes that would meet NCAA scholarship eligibility requirements and that the guidance counselor subsequently gave them bad advice. Specifically, they allege that the guidance counselor told them that the District's Broadcast Communications class met NCAA standards when in fact it did not. The Scotts have attempted to fit these facts into a breach of contract claim. Failing that, they attempt to make the facts fit a promissory estoppel claim. Under the law, however, their claim is properly considered a negligent misrepresentation claim. Section 893.80(4) of the Wisconsin Statutes provides the District with immunity from liability for any such negligence, however.

Upon the District's motion to dismiss, the trial court dismissed the Scotts' claims of breach of contract and promissory estoppel on the basis that they failed to state claims upon which relief could be granted. It also dismissed the Scotts' negligence claim on the basis of immunity. The appellate court affirmed the trial court's judgment. The District respectfully submits that the Supreme Court should affirm those decisions in their entirety as well.

ARGUMENT

The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. Evans v. Cameron, 121 Wis. 2d 421, 426, 360 N.W.2d 25, 28 (1985). Thus, the facts pled are taken as admitted. Although the District disputes many of the factual allegations contained in the Scotts' Complaint, it submits that, even assuming the allegations are true, the trial court properly dismissed the Complaint for failing to state claims upon which relief can be granted and the appellate court properly affirmed the dismissal.

I. THE LOWER COURTS CORRECTLY DISMISSED THE SCOTTS' CONTRACT CLAIM BECAUSE THEIR CLAIM SOUNDS IN TORT AND BECAUSE PAYING TAXES AND SENDING YOUR CHILDREN TO SCHOOL IN A PARTICULAR DISTRICT IS INSUFFICIENT CONSIDERATION TO SUPPORT A CONTRACT.

In addition to their claim of negligence (which is fully addressed below), the Scotts allege that a contract existed between them and the District, whereby the District agreed to provide guidance and counseling services to them and where, in exchange, the Scotts agreed to pay their property taxes and send Ryan Scott to high school in the District. (R. 13; R-Ap. 13.) Their contract claim was properly dismissed as a matter of law, first, because their

claim sounds in tort not contract, and second, because the purported contract fails for lack of consideration.

A. The Court of Appeals Properly Upheld the Trial Court's Dismissal of the Scotts' Contract Claim Because the Matter Sounds in Tort, Not Contract.

"It is important to maintain this distinction [between tort and contract law] because the two theories serve very different purposes." State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 225 Wis. 2d 305, 315, 592 N.W.2d 201, 205, (1999). An obligation arises under contract when there is an exchange of promises supported by consideration. Ferraro v. Koelsch, 124 Wis. 2d 154, 165, 368 N.W.2d 666, 672 (1985). In order for a contract to exist, there must be "an offer, an acceptance, and consideration." Flambeau Products Corp. v. Honeywell Info. Sys., Inc., 116 Wis. 2d 95, 112, 341 N.W.2d 655, 664 (1984).

> Contract law . . . is based on obligations imposed by bargain, and it allows parties to protect themselves through bargaining. The law of contracts is designed to effectuate exchanges and to protect the expectancy interest of parties to private bargained-for agreements. A party to a contract voluntarily assumes a duty to perform a promise. The law of contracts seeks to hold parties to their promises, ensuring that each party receives the benefit of his or her bargain.

State Farm, 225 Wis. 2d at 316-17, 592 N.W.2d at 206 (emphasis added) (citations omitted) (quotations omitted).

"Essentially, contract law is based upon the principles of free will and consent." Mackenzie v. Miller Brewing

Co., 2001 WI 23, ¶ 28, 241 Wis. 2d 700, 725, 623 N.W.2d 739, 749. It permits parties to bargain for their obligations to one another rather than having those obligations established under law. Prent Corp. v. Martek Holdings, Inc., 2000 WI App 194, ¶ 18, 238 Wis. 2d 777, 789, 618 N.W.2d 201, 206. On the other hand, tort law "rests on obligations imposed by law." Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 405, 573 N.W.2d 842, 846 (1998).

The Scotts argue that a contract exists between them and the District for the provision of guidance counseling services. The Scotts' argument fails, however, because the District's obligation to provide guidance counseling services arises by law. Specifically, Wis. Stat. § 121.02(1)(e) requires school districts to "[p]rovide guidance and counseling services," and Wis. Admin. Code § PI 8.01(2)(e) outlines the requirements for a school district's guidance and counseling program.

Thus, any failure to provide guidance and counseling services is a breach of a legal duty, not a breach of contractual duty. The District's obligation to provide guidance and counseling services to the Scotts did not arise out of the type of "private bargained-for agreement" that the law of contracts recognizes. Nor was the obligation "voluntarily assumed" by the District. The obligation was imposed upon the District by the legislature and thus arose

by law, not by contract. The lower courts therefore properly "decline[d] to blur the essential lines that divide tort from contract" and dismissed the Scotts' claims that sound in contract. Mackenzie, 2001 WI 23, ¶ 17. The District respectfully submits that the Supreme Court should affirm the Court of Appeals' decision.

The Scotts state that the issue presented by their breach of contract claim has not been addressed by a Wisconsin Appellate Court and ask the Court to permit their contract claim on the basis of three cases from outside this Court's jurisdiction. (Appellants' Br. at 10-11.) However, those cases are quite distinguishable from the case at hand because, although all three hold that the basic legal relationship between a college and its students is contractual in nature, none of them involved a high school student's family suing a public school district. See Hendricks v. Clemson Univ., 339 S.C. 552, 564, 529 S.E.2d 293, 299 (S.C. Ct. App. 2000) (recognizing contractual nature of the relationship between a student and university or college); Wickstrom v. North Idaho Coll., 111 Idaho 450, 452, 725 P.2d 155, 157 (Idaho 1986) (permitting breach of contract claim for college's alleged failure to teach the course work promised); Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) (recognizing contractual relationship between private institution and student).

Furthermore, this case does not involve a situation where the student chose one particular post-secondary institution over another and paid that institution's tuition directly out of the student's pocket directly to the institution. This case involves a public school district. Public schools are supported by all property holders in the school district, whether or not those residents utilize that district's services. The Scotts have failed to cite any case in support of their argument that a public school district, funded exclusively by taxpayer dollars, is bound by contract to perform governmental services as required by law. Failing to find any such case, the Scotts cite to Sain v. Cedar Rapids Comm. Sch. Dist., 626 N.W.2d 115 (Iowa 2001). Although Sain may be, as the Scotts put it, "remarkably factually similar" to this case, its principles cannot be followed here.

Citing Sain, the Scotts argue against a finding that this case represents a tort claim of "educational malpractice." (Appellants' Br. at 11-13.) The District has not made such an argument but surmises that the Scotts cite the case because the Iowa court permitted a finding of liability against the school district. The Court should note, however, that the Iowa court did not find that a contract existed between the student and the school district. Furthermore, the reasoning of the Iowa Supreme

Court cannot be followed here because, although the Iowa Supreme Court permitted the tort claim of negligent misrepresentation to proceed under Iowa law, it specifically observed that "some states have enacted statutes giving schools and teachers immunity from any liability." Id. at 127. As fully set forth below, via Wis. Stat. 893.80(4), Wisconsin is one of those states that provides immunity under the circumstances presented here.

Finally, the Scotts' contract claim should be denied because the high school guidance counselor was not performing a contractual obligation but was "engaged in the performance of a public service, in which [neither he nor the school district had any] particular interest, and from which [they] derive[d] no special benefit or advantage . . . but which [they are] bound to see performed in pursuance of a duty imposed by law for the general welfare of . . . the community." Holytz v. City of Milwaukee, 17 Wis. 2d 26, 31-32, 115 N.W.2d 618, 621 (1962)(quoting Hayes v. City of Oshkosh, 33 Wis. 314 (1873).

Although the above-quoted language was written in support of municipal immunity, the policy behind it applies to the Scotts' contract claim as well. The District, through the guidance counselor, was performing a public service, not a contract, when rendering advice. Neither the guidance counselor nor the District had a particular

interest and neither derived any special benefit or advantage from providing guidance counseling services to the Scotts. Having no particular interest and deriving no special benefit or advantage from having a guidance counseling program establishes the lack of a contractual relationship between the parties.

B. The Court of Appeals Properly Upheld the Trial Court's Dismissal of the Scotts' Contract Claim for Lack of Consideration.

The Scotts argue that the Court of Appeals misconstrued their main argument on the breach of contract issue. They phrase their "main argument" as follows:

> The Scotts claimed that the District, through the SPASH Educational Planner specifically offered to provide guidance and counseling services by professional guidance counselors with years of experience and expertise regarding scholarship and financial aid information. The Scotts accepted that offer and met with a licensed professional counselor, Mr. Johnson, who, in addition, agreed to counsel Ryan to take NCAA approved core courses so that he would meet the NCAA student athlete eligibility requirements.

(Appellants' Br. at 9.)

The appellate court did not misconstrue the Scotts' main argument, it rejected the first premise of their argument--that there was any offer or bargain at the outset. As the Seventh Circuit Court of Appeals noted in Holcomb v. United States, 622 F.2d 937 (7th Cir. 1980), "a promise to do something which the promisor is already legally obligated

to do does not constitute consideration." Id. at 941. As a result, the alleged "additional" agreement ("to counsel Ryan to take NCAA approved core courses so that he would meet the NCAA student athlete eligibility requirements") must be supported by some consideration for the "additional" promise. As the lower courts recognized, there was no such consideration.

In making the above-quoted statement, the Holcomb court relied on what is now 17A Am. Jur. 2d Contracts § 144 which specifically states, "A promise to do that which the promisor is already legally bound to do, or performance of an existing legal obligation, does not as a general rule constitute consideration, or sufficient consideration, for a contract." Restatement Contracts § 76 is also instructive, it states,

> Any consideration that is not a promise is sufficient to satisfy the requirements of § 19(c), except the following: (a) An act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or if imposed by the law of torts or crimes, is owed to any person.

Thus, where there is a legal obligation to perform services, the general rule is that there is insufficient consideration to form a contract.

The Scotts argue that comment b of Restatement (Second) of Contracts § 73 applies in this case. However, Restatement (Second) of Contracts § 73, including comment b,

relates to situations where performance of services are in "addition to or materially different from the performance of the [legal] duty." The rule does not apply, as the Scotts argue, when "the legal duty is so clear and specific that it leaves absolutely no room for doubt or discretion." (Appellants' Br. at 18.) Rather, as found in both Restatement of Contracts § 76 and Restatement (Second) of Contracts § 73, in order to have sufficient consideration where there is a legal duty to perform services, the party performing the services must perform services in addition to or materially different from the services required by a legal obligation. In this case, the services provided to the Scotts were not "in addition to, or materially different from" the performance of its legal obligation to provide guidance counseling. The services provided were guidance counseling services.

Under Wis. Admin. Code PI § 8.01(2)(e)5., the District is required to provide counseling services that include post-secondary planning. Simply because the Wisconsin Administrative Code does not specify what post-secondary planning includes, does not mean that every time a school district assists a student with specific post-secondary planning it is performing services "in addition to or materially different from" the school district's legal obligation to provide those services, thereby entering into

contractual relationships with each and every student who asks for and receives such counseling services. The guidance counselor in this case was providing post-secondary planning services to Ryan Scott pursuant to the District's legal obligation; those services were not "in addition to or materially different from" the District's legal obligations. Therefore, there was insufficient consideration to form a contract.

Although the Scotts attempt to establish consideration by arguing that the District benefited from Ryan Scott's enrollment though the school choice funding formulas, the appellate court was correct in finding that "[t]his was not a bargained-for exchange of promises between the parties." (A-Ap. 1-3.) A contract requires a bargain. Neither the Scotts nor any other taxpayer bargains with a school district to provide services. There were no negotiations whereby the Scotts, in effect, said, "We will pay our taxes and send our son to SPASH if you agree to provide him certain specific services."

The Scotts have alleged that the counseling services "promised" in the handbook persuaded them to send their son to SPASH as opposed to some other private school or to a high school outside their resident district. They cite to Ferraro in support of their argument that the District's statements in the SPASH Education Planner encouraging

students to discuss their futures with the guidance counselors and directing them to consult with school counselors to determine specific requirements of the college or university, supports the finding of a contract. (See Appellants' Br. at 23-24) However, Ferraro does not hold that handbooks of this sort generally rise to the level of a contract. Instead, the Court held that the nature of the handbook must be examined to determine whether there was an exchange of promises which would support a bilateral contract. Id. at 167, 368 N.W.2d at 673. Just as handbooks produced by an employer for the guidance and orientation of employees may not be converted into an express contract by implication alone, id. at 166, 368 N.W.2d at 672-73, the SPASH Educational Planner may not be converted into an express contract here.

Throughout their brief the Scotts narrow and expand the terms of the putative "contract" to suit their argument. The broad view, that the contract was between them and the District for the provision of guidance counseling services to Ryan Scott, fails for lack of consideration because taxes and attendance only ensure that the Scotts received the statutorily required guidance services which the District is legally obligated to provide. The narrower view, that the agreement was between the Scotts and the guidance counselor, whereby the guidance counselor agreed to advise them on

which courses Ryan Scott should take to ensure NCAA eligibility, also fails for lack of consideration.

The Scotts argue that their "utilization of the services promised and their continued enrollment of Ryan in a district school . . . is sufficient consideration on their part." (Appellants' Br. at 21.) However, the Scotts decided to enroll Ryan in SPASH long before the guidance counselor agreed to advise them on which courses Ryan should take to ensure NCAA eligibility. By the Scotts' admission, the guidance counselor allegedly "agreed" to do so during Ryan's junior year at SPASH. (Appellants' Br. at 4; see also R-Ap. 9-11.) Thus, the alleged "specific promise by the guidance counselor to advise Ryan to take NCAA approved core courses" had nothing to do with the Scotts' decision to pay their taxes and send Ryan to SPASH. (Appellants' Br. at 21.) Neither was consideration for the other. Furthermore, even if the guidance counselor had a legal obligation to counsel without error, any contractual obligation to do so arises via his contract of employment with the District, not via contract with the Scotts. Courts are hesitant to expand such contractual obligations "solely because students benefit from the services provided by schools through contracts with others." Schilling by Foy v. Employers Mut. Cas. Co., 212 Wis. 2d 878, 895, 569 N.W.2d 776, 784 (Ct. App. 1997).

If the Court were to find a contract under these circumstances, it would be tantamount to finding that a contract is created every time a municipal employee agreed to assist a taxpayer, or every time a student asked a guidance counselor for specific help. As the trial court noted, such a finding "would lead to a taxpayer suit a minute." (A-Ap. 8.) Further, if the Scotts' arguments regarding consideration were accepted by the Court, it could lead to an absurd result. Property owners who send their children to public schools could have a claim for breach of contract where individuals who do not own property, but send their children to public schools, could not have such a claim. Such disparate treatment between property holders and non-property holders runs contrary to the concept of public education whereby all students are entitled to the same services. This would be the result if the Court were to find that choosing to send a child to one school over another is sufficient consideration on the parents' part to support a contract. The District submits that it is not.

II. THE APPELLATE COURT'S RULING THAT THE SCOTTS' PROMISSORY ESTOPPEL CLAIM FAILS UNDER THE LAW SHOULD BE AFFIRMED BECAUSE THE CLAIM SOUNDS IN TORT, NOT CONTRACT, AND BECAUSE THE SCOTTS CANNOT SATISFY THE NECESSARY ELEMENTS OF SUCH A CLAIM.

As fully set forth above, the Scotts' claim is based in tort, not contract. Therefore, for the same reasons it was proper for the appellate court to uphold the trial court's dismissal of the Scotts' contract claim, it was also proper for the appellate court to uphold the trial court's dismissal of their promissory estoppel claim. Notwithstanding, the Scotts have failed to plead the necessary elements of promissory estoppel.

A. The Scotts Promissory Estoppel Claim Fails Because the Claim Sounds in Tort, Not Contract.

The doctrine of promissory estoppel was developed to address situations where a contract was not completed, but equity required a remedy. The Court has described promissory estoppel as "an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings." Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 695, 133 N.W.2d 267, 273 (1965) (emphasis added). "It is the lack of a contract . . . that allows claims for promissory estoppel." Mackenzie, 2001 WI 23, ¶ 34 (Abrahamson, C.J., dissenting). Thus, even if the allegations in the Scotts' Complaint are true, this matter does not represent the type of situation

promissory estoppel was recognized to address because the action does not sound in contract, but in tort. Furthermore, as set forth above, there was no "business dealing" or any other type of dealing here.

The Wisconsin Supreme Court recognized the doctrine of promissory estoppel in Hoffman. In Hoffman, Red Owl made several promises and assurances upon which the plaintiffs relied and acted upon to their detriment.

> Foremost were the promises that for the sum of $18,000 Red Owl would establish Hoffman in a store. After Hoffman had sold his grocery store and paid the $1,000 on the Chilton lot, the $18,000 figure was changed to $24,100. Then in November, 1961, Hoffman was assured that if the $24,100 figure were increased by $2,000 the deal would go through. Hoffman was induced to sell his grocery store fixtures and inventory in June, 1961, on the promise that he would be in his new store by fall. In November, plaintiffs sold their bakery building on the urging of defendants and on the assurance that this was the last step necessary to have the deal with Red Wol [sic] go through.

Id. at 697, 133 N.W.2d at 274.

The deal did not go through and the court permitted the plaintiffs to recover their damages under the doctrine of promissory estoppel despite Red Owl's claims that its promises were not so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. Id. at 697-98, 133 N.W.2d at 274-75.

Other decisions permitting recovery under promissory estoppel include Seater Constr. Co., Inc. v. Rawson Plumbing, Inc., 2000 WI App 232, ¶ 1, 239 Wis. 2d 152, 155, 619 N.W.2d 293, 294, where a general contractor brought a promissory estoppel action against a plumbing subcontractor on the basis that it incurred additional expenses as a result of the subcontractor's failure to honor its bid. In U.S. Oil Co., Inc. v. Midwest Auto Care Services, Inc., 150 Wis. 2d 80, 84, 440 N.W.2d 825, 826 (Ct. App. 1989), a promissory estoppel claim was permitted because U.S. Oil was damaged after it sold products to Auto Care based on its promise to participate in Uniroyal's dealership program and finance the inventory through Uniroyal's book balance program.

A review of these cases applying the doctrine of promissory estoppel establish that the courts have permitted its application to maintain "honesty and fair representations in all business dealings." Seater, 2000 WI App. 232, ¶ 19 (quoting Hoffman, 26 Wis. 2d at 695, 133 N.W.2d at 273). The Court of Appeals properly upheld the trial court's dismissal of the Scotts' promissory estoppel claim because this case does not involve any business dealings or any allegation of dishonesty. This is a case that involves an alleged error by a school district guidance counselor.

B. The Scotts Have Failed to Plead the Necessary Elements of a Claim for Promissory Estoppel.

Notwithstanding the fact that this is not the type of claim the doctrine of promissory estoppel was recognized to address, the Scotts have not pled the necessary elements to state a claim for promissory estoppel. The elements of promissory estoppel are: 1) the promise is one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; 2) the promise induced such action or forbearance; 3) injustice can be avoided only by enforcing the promise. Hoffman, 26 Wis. 2d at 698, 133 N.W.2d at 275.

Assuming the facts claimed are true and that the Scotts met the first element of promissory estoppel despite the fact that the District's "promise" to provide guidance counseling was illusory because it was a "promise" to provide services which it was required by law to provide, the Scotts' Complaint is insufficient to meet the second and third elements.

The Scotts cannot satisfy the second element because they have not alleged that the District's "promise" to provide guidance in the selection of courses induced them to take any action or forbear taking any action. For example, the "promise" to provide guidance services did not cause the Scotts to cancel a contract with another guidance counselor.

Furthermore, the guidance counselor fulfilled the alleged "promise" to provide guidance in selecting courses. As the Court of Appeals' decision correctly summarized, "it was not the District's promise to provide counseling that induced Ryan to take the Broadcast Communications class, but rather the counselor's representation that the Broadcast Communications class would satisfy NCAA scholarship eligibility requirements." (A-Ap. 4.) The Scotts relied on a representation that the class was approved by NCAA--not a "promise" that the class was approved by NCAA. Thus, even assuming the circumstances giving rise to the Scotts' claims were as represented by them in their Complaint, their claim sounds in tort, not promissory estoppel.

The third requirement with respect to the doctrine of promissory estoppel is that the remedy can only be invoked when necessary to avoid injustice. Hoffman, 26 Wis. 2d at 698, 133 N.W.2d at 275. The third requirement involves equitable and policy decisions by the Court. Id. The Wisconsin Supreme Court has recognized that "formality can be considered in making the equitable decision of whether it is a proper case for the application of the doctrine." Silberman v. Roethe, 64 Wis. 2d 131, 146, 218 N.W.2d 723, 730 (1974). In this case, the alleged "promise" of the guidance counselor to help Ryan Scott choose classes that met NCAA standards was informal at best and is not the type

of promise upon which a claim of promissory estoppel should be recognized.

Indeed, both the trial court and the Court of Appeals found public policy reasons to deny application of the doctrine. The trial court recognized that the public policy of municipal immunity for the exercise of discretion prohibits the application of the doctrine of promissory estoppel in this case; the appellate court held that judicial enforcement of the alleged promise to provide information would not avoid or remedy any injustice which may have occurred because the District was the entity in charge of certifying Ryan's eligibility status or granting him the scholarship. The District submits that the lower courts' holdings were correct and should be affirmed.

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S JUDGMENT THAT RENDERING GUIDANCE COUNSELING AND ADVICE ARE DISCRETIONARY ACTIVITIES OF A HIGH SCHOOL GUIDANCE COUNSELOR.

The Scotts assert a negligence claim based on their claim that the guidance counselor failed to exercise reasonable care in advising them that Broadcast Communications was an NCAA approved core course. The trial court dismissed the Scotts' negligence claim, finding the instant action "so similar to the claim of John Kierstyn in Kierstyn v. Racine Unified School District, 228 Wis. 2d 81, 596 N.W.2d 417 (1999) that [the District] is entitled to the

granting of its motion to dismiss." (A-Ap. 7.) The District submits that the appellate court properly affirmed the trial court's dismissal of the Scotts' negligence claim on the basis that it is immune from liability under Wis. Stat. § 893.80(4).

Section 893.80(4) of the Wisconsin Statutes provides that political subdivisions (such as school districts) are relieved from liability for acts done pursuant to legislative, judicial, quasi-legislative, or quasi-judicial capacities. "To describe an activity as quasi-judicial or quasi-legislative is to say that the activity involves the exercise of discretion." Kierstyn, 228 Wis. 2d at 90, 596 N.W.2d at 422. Thus, school districts (and their employees) enjoy immunity from liability for injuries resulting from the performance of any discretionary act within the scope of their governmental employment. Id. at 88, 596 N.W.2d at 421. The Scotts argue that statutory immunity cannot be found here because, they argue, guidance counseling is a ministerial function and that the guidance counselor exercised professional, non-governmental discretion when providing guidance counseling to the Scotts. An analysis of Wisconsin Supreme Court precedent establishes that the lower courts were correct in rejecting the Scotts' arguments.

A. Guidance Counseling Is a Discretionary Duty Because the Law Does Not "Impose, Prescribe or Define the Time, Mode, and Occasion" for Giving Guidance Counseling.

Wisconsin Supreme Court precedent leaves little doubt about the ministerial duty exception under Wis. Stat. § 893.80(4). Just six months ago (only twenty-three days prior to the Court of Appeals' decision affirming the trial court's judgment) the Wisconsin Supreme Court addressed the exceptions to municipal immunity in Lodl v. Progressive Northern Ins. Co., 2002 WI 71, 253 Wis. 2d 323, 646 N.W.2d 314. This Court explained the exceptions to municipal immunity as follows:

> There is no immunity against liability associated with: 1) the performance of ministerial duties imposed by law; 2) known and compelling dangers that give rise to ministerial duties on the part of public officers or employees; 3) acts involving medical discretion; and 4) acts that are malicious, willful, and intentional.

Id. at ¶ 24 (emphasis added)(citing Willow Creek Ranch, L.L.C. v. Town of Shelby, 2000 WI 56, ¶ 25, 235 Wis. 2d 409, 611 N.W.2d 693).

Thus, liability may be imposed against a school district for the faulty exercise of "ministerial duties imposed by law;" however, school districts are shielded from liability for the faulty exercise of discretionary duties. Kierstyn, 228 Wis. 2d at 91, 596 N.W.2d at 422. The issue

then, is whether providing guidance counseling involves an exercise of discretion.

The Wisconsin Supreme Court describes ministerial duties as follows:

> A public officer's duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.

Id. (quoting Lister v. Board of Regents of Univ. Wis. Sys., 72 Wis. 2d 282, 301, 240 N.W.2d 610, 622 (1976)).

The District submits that guidance counseling is a discretionary activity because the law requiring school districts to give guidance counseling does not "impose, prescribe or define the time, mode, and occasion" for giving guidance counseling. The statute simply requires school districts to "[p]rovide guidance and counseling services." Wis. Stat. § 121.02(1)(e).

The Wisconsin Supreme Court considered the issue in Kierstyn where the plaintiffs asked the school district's benefits specialist for advice, the answer to which was unambiguously set forth in the statutes. The benefits specialist gave the Kierstyns an erroneous answer. Unfortunately, the Kierstyns followed that advice to their substantial detriment. The plaintiffs argued that the benefits specialist's conduct should be considered

ministerial because the incorrect advice resulted from his incorrect reading of a clear and unambiguous statute. The Court, however, held that the benefits specialist was performing discretionary duties because the benefits specialist did not have a specific legal obligation to advise the plaintiffs in a proscribed manner. In addition, the Kierstyn court noted that the benefits specialist was not an agent of the Wisconsin Retirement System and thus could not authoritatively represent to employees what WRS benefits they were entitled to receive. Kierstyn, 228 Wis. 2d at 85, 596 N.W.2d at 419-20.

Similarly to Kierstyn's argument, the Scotts argue that the NCAA guidelines are so unambiguous that their interpretation should be held to be ministerial. However, interpretation of NCAA guidelines is not a "ministerial duty imposed by law." See Lodl, 2002 WI 71, ¶ 24. As more fully set forth below, the duty imposed by law, was to have a guidance and counseling program.

Just as the plaintiff's focus was misplaced in Kierstyn, the Scotts' focus is misplaced here. As the Court instructed in Kierstyn:

> Kierstyn focuses his ministerial duty analysis not on any obligation the statute imposed on Farrell, but rather on the statute's clarity.
>
> However, to argue that the statute is clear is to miss the point of immunity. As the circuit court aptly stated:

> [Kierstyn really argues] that Farrell had a duty to exercise due care and a duty not to be negligent. That, however, is precisely what the doctrine of immunity insulates a party from, *i.e.*, liability due to the fact that they have been negligent. The fact that certain conduct may have been negligent does not transform that conduct into a breach of a ministerial duty. The existence of a duty of care does not necessarily imply that the duty was ministerial. Consideration of the issue of immunity implies that the party was or may have been negligent. If they were not, they would not need to seek the protection of immunity.
>
> Immunity presupposes negligence and has no reason for existence without it. Kimps v. Hill, 200 Wis. 2d 1, 11, 546 N.W.2d 151 (1996).

Kierstyn, 228 Wis. 2d at 94-95, 596 N.W.2d at 424.

The Supreme Court further addressed the Scotts' argument in Kierstyn where the plaintiff argued that the disability benefits statute was unambiguous. The Court replied:

> We cannot accept Kierstyn's argument that an unambiguous statute creates a ministerial duty. As noted above, a public officer's duty must arise from some obligation created by law. The District was under no legal obligation to hire a benefits specialist. In like fashion, [the benefits specialist] was under no legal obligation to offer advice about WRS benefits to employees of the District.

Id. at 92, 596 N.W.2d at 423.

Just as the benefits specialist in Kierstyn was under no legal obligation to offer advice about WRS benefits to employees (despite the fact that it was apparently one of her job duties), the guidance counselor here was under no

legal obligation to offer advice about NCAA standards to the Scotts. The District's only legal obligation was to provide guidance and counseling services as required by Wis. Stat. § 121.02(1)(e) and Wis. Admin. Code PI § 8.01(2)(e).

Citing the Administrative Code, the Scotts argue that the District had a ministerial duty to provide non-negligent guidance counseling to the Scotts. (Appellants' Br. at 40.) The administrative regulation promulgated by the Department of Public Instruction sets forth the following requirements for all public school districts with respect to guidance and counseling services:

> 1. The school district shall maintain a school board approved plan for the provision of a program of guidance and counseling services.
> 2. The program shall be developmentally based and available to every pupil in every grade of the school district.
> 3. The program shall be:
> a. Systematically planned by licensed school counselors in collaboration with other licensed pupil services staff, teachers, parents and community health and human service professionals.
> b. Provided by licensed school counselors in collaboration with other licensed pupil services staff, teachers, parents and community health and human service professionals.
> 4. The program shall provide developmentally appropriate educational, vocational, career, personal and social information to assist pupils in problem solving and in making decisions.
> 5. The program shall include pupil appraisal, post-secondary planning, referral, research and pupil follow-up activities.

Wis. Admin. Code PI § 8.01(2)(e).

The District's duty is to create and maintain a program of guidance and counseling as required by the regulation set forth above may be ministerial. Estate of Cavanaugh v. Andrade, 202 Wis. 2d 290, 301-05, 550 N.W.2d 103, 108-10 (1996). The execution of that program is not. Spencer v. County of Brown, 215 Wis. 2d 641, 652, 573 N.W.2d 222, 226-27 (Ct. App. 1997) (holding that how to comply with mandatory duty to keep premises safe imposed by the safe place statute is discretionary). Thus, the District's administration of the program once it is created is not ministerial, but discretionary because the law does not prescribe or define the "time, mode and occasion" for the provision of guidance counseling services. Rolland v. County of Milwaukee, 2001 WI App 53, ¶ 9, 241 Wis. 2d 215, 222, 625 N.W.2d 590, 593-94 (holding the governmental employee may have ministerial duty to take some action although how that act is performed is discretionary).

Finally, the Court should disregard the Scotts' arguments that cite to McQuillin in support of the application of the public duty rule. (Appellants' Br. at 44-45) Analysis of the public duty rule is not necessary nor applicable here because, as McQuillin notes, analysis of the public duty rule is undertaken in jurisdictions "where sovereign immunity has long been dead." 18 McQuillin Municipal Corporations § 53.04.25 at 165 (3d ed.).

Sovereign immunity is not dead in Wisconsin, where municipal immunity is given by statute, Wis. Stat. § 893.80(4). Furthermore, McQuillin notes that "even where a special duty is found to exist, a municipality or school district is not liable unless there also exists statutory liability." 18 McQuillin Municipal Corporations § 53.82.10 at 68 (3d ed.). In this case, there is statutory immunity. Wis. Stat. § 893.80(4). The Scotts' arguments in favor of liability should therefore be rejected.

B. The Court of Appeals and Trial Court Properly Rejected the Scotts' Argument That the Guidance Counselor Exercised Non-governmental Discretion When Advising Them Because the *Scarpaci* Rule Does Not Apply Here.

Citing the Scarpaci rule which excludes a public officer's professional discretionary acts from immunity, the Scotts argue that the discretion required in performing counseling duties is professional discretion, not protected by Wis. Stat. 893.80(4). Noting the Court's refusal to expand Scarpaci beyond the medical context, the lower courts rejected the Scotts' argument. As set forth below, the recent Supreme Court decision in Lodl establishes the propriety of the lower courts' refusal to do so.

In Scarpaci, the Court found that the manner in which a county coroner performed an autopsy involved an exercise of professional, non-governmental discretion and that immunity

did not, therefore, apply. Scarpaci v. Milwaukee County, 96 Wis. 2d 663, 686-87, 292 N.W.2d 816, 827 (1980). In Kimps v. Hill, 200 Wis. 2d. 1, 546 N.W.2d 151 (1996), the Court declined to expand Scarpaci. In that case, the defendant had a doctorate in education and twenty-three years of experience. The Court, stating that "professional judgment" and "governmental discretion" are not mutually exclusive, held that "the fact that Hill's profession requires that he exercise his discretion in the performance of his governmental duties as a teacher for the state does not strip him of the protective cloak of immunity." Kimps, 200 Wis. 2d at 18, 546 N.W.2d at 159. So too here. Mr. Johnson's guidance counseling is not a "non-governmental" service. Just as in Kimps, any negligent omissions or commissions were made in the course of performing governmental functions as a school district employee. See id. at 21, 546 N.W.2d at 160.

Three years after Kimps, the Wisconsin Supreme Court noted the Court of Appeals' conclusion that the Scarpaci rule extends no further than the medical setting and declined to hold otherwise. Kierstyn, 228 Wis. 2d at 98, 596 N.W.2d at 425 (citing Stann v. Waukesha County, 161 Wis. 2d 808, 818, 468 N.W.2d 775, 779-80 (Ct. App. 1991)). More recently in Willow Creek Ranch, the Supreme Court specifically noted that the Scarpaci rule applies only to

actions involving medical discretion. Willow Creek Ranch, 2000 WI 56, ¶ 26. In Rolland, the Court of Appeals noted that there are limited exceptions to governmental immunity and that only "where, in a 'medical context,' the act or omission by the governmental employee is "'professional' in nature" rather than 'governmental.'" Id., 2001 WI App 53, ¶ 8 n.1. Finally, on June 25, 2002, the Supreme Court summarized the above-noted precedent and expressed what was previously termed the "professional discretion" exception, or the "Scarpaci rule" by stating that there is "no immunity against liability associated with . . . acts involving medical discretion." Lodl, 2002 WI 71, ¶ 24.

Notwithstanding the precedent cited above, the Scotts continue to argue that the Court should extend the Scarpaci rule on the basis that the guidance counselor in this matter was exercising his professional, non-governmental discretion. Despite the Court's holding in Kimps that "professional judgment" and "governmental discretion" are not mutually exclusive, the Scotts claim that the credentials required of a professional school counselor remove them from the cloak of immunity. They refer to the administrative code's reference to "professional school counselor" and cite to Webster's Dictionary definition of "profession." However, "it is the nature of the specific act upon which liability is based, as opposed to the

categorization of the general duties of a public officer, which is determinative of whether an officer is immune from liability." Rolland, 2001 WI App 53, ¶ 8. Thus, Johnson's position of "professional school counselor" does not determine whether he was exercising professional non-governmental judgment sufficient to extend Scarpaci.

A second definition of the word "profession" is "a principal calling, vocation, or employment." Webster's Collegiate Dictionary 930 (10th ed. 1995). It is more likely this definition of the word "profession" that the Department of Public Instruction was utilizing when promulgating its requirements for a "professional school counselor." Certainly, other school district personnel provide some counseling, but it is the "professional school counselor" who devotes his principal vocation to providing said counseling. If Scarpaci were extended to include medical professionals and professional school counselors, any number of municipal employment positions and activities could be exposed to liability. Nevertheless, the Court's focus should not be on the definition of the word "professional," but on what is properly considered professional, "non-governmental" discretion.

The Scarpaci rule was recognized because, the Court found, the coroner in Scarpaci was exercising non-governmental discretion during the performance of an

autopsy. An autopsy is primarily a medical procedure; it must be performed by a medical professional. It need not be performed by a coroner who, incidentally, need not be a medical professional to hold the office of coroner. Counties may institute the medical examiner system to ensure a medical professional performs the duties of coroner. (See Wis. Stat. § 59.34.) In this case, although a guidance counseling program is required by law, guidance counseling must be performed by a licensed school counselor who meets the criteria set forth in Wis. Admin. Code PI § 3.49(2). There would likely be no "licensed professional school counselors" absent the law requiring public school guidance counselors to be licensed. On the other hand, medical doctors would exist and would perform autopsies even if there were no office of coroner.

Although Lodl was not precedential at the time of the trial court's decision and was newly released precedent at the time of the appellate court's affirmance, both courts were thus correct in refusing to extend the Scarpaci rule to include public school guidance counselors. The District submits that the Supreme Court should follow its precedent and affirm the lower courts' decisions because the guidance counselor in this case was not involved in an exercise of professional, non-governmental discretion. Governmental immunity for acts requiring discretion must be preserved

because immunity serves an important purpose. If there was no immunity for performance of discretionary duties, the floodgates would open and the courts and government would be overburdened.

IV. IF THE COURT FINDS IN FAVOR OF THE SCOTTS' POSITION ON APPEAL, THE FLOODGATES WILL OPEN AS THE ALLOWANCE OF A RECOVERY UNDER THESE AND SIMILAR CIRCUMSTANCES WOULD ENTER A FIELD THAT HAS NO SENSIBLE OR JUST STOPPING POINT.

The Scotts argue that the discretionary/ministerial act test for determining entitlement to immunity is unworkable and should be discarded. (Appellants' Br. at 46-52.) They further argue that the societal burden created by immunity is far greater than its benefit. (Appellants' Br. at 51-52.) It appears that the Scotts would do away with governmental immunity altogether. Section 893.80(4) of the Wisconsin Statutes, however, reflects the legislature's public policy decision that liability should not follow in every case where negligence is established. The Supreme Court expressed agreement in Lodl where it recognized that both immunity and exceptions to immunity represent "a judicial balance struck between the need of public officers to perform their functions freely and the right of an aggrieved party to seek redress." Lodl, 2002 WI 71, ¶ 24 (quotations omitted).

Although the Scotts spend several pages of their brief impugning the discretionary/ministerial act test, they offer

no viable alternative. They suggest that municipalities should "be responsible for tortuous conduct that can not truly be characterized as legislative or judicial." (Appellants' Br. at 52.) Notwithstanding good policy reasons to the contrary, this suggestion is not possible under Wis. Stat. § 893.80(4), which provides for immunity for municipal "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." Id. (emphasis added). Thus, the legislature must make the policy decision the Scotts ask the Court to make here.

Notwithstanding the fact that the statute prohibits the Court from adopting the Scotts' public policy position, the Court recognized in Mackenzie that the legislature is in a better position to address the Scotts' concerns:

> Courts are not equipped to pursue the paths for discovering wise policy. A court is confined within the bounds of a particular record, and it cannot even shape the record. Only fragments of a social problem are seen through the narrow windows of a litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution.

Mackenzie, 2001 WI 23, ¶ 21.

Although in Mackenzie the Court was specifically addressing the appellant's request to recognize a new cause of action in tort, the Court's rationale is apropos here as well. "The legislature, with all its resources and investigative powers, is the appropriate forum for such a

sweeping policy decision, which would affect millions of Wisconsin citizens." Id.

Wisconsin appellate courts have upheld the public policy of limited immunity for good reasons, consistent with the common law concept of proximate cause which provides that liability does not necessarily follow even after negligence has been established. Sanem v. Home Ins. Co., 119 Wis. 2d 530, 538, 350 N.W.2d 89, 92 (1984). "This is because 'proximate cause,' the second component of causation in negligence cases, which is separate from the cause-in-fact determination, may deny recovery. 'Proximate cause' involves public policy considerations and is a question of law solely for judicial determination." Id. at 538, 350 N.W.2d at 92-93 (citations omitted).

In Sanem, the Court set forth six public policy reasons for not imposing liability in spite of a finding of negligence as a substantial factor in producing the plaintiff's injury. They are as follows:

> (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

Id. at 539, 350 N.W.2d at 93 (citing Walker v. Bignell, 100 Wis. 2d 256, 265, 301 N.W.2d 447, 453 (1981).

In this case, three of the above-noted public policy concerns are overriding. First, allowance of recovery would place too unreasonable a burden on public school districts. There are tens of thousands of students in the Wisconsin public school system. If the Court were to deny immunity, school districts across the state may decide to undertake a less helpful mode of providing the required counseling in an effort to lessen the potential liability for giving erroneous advice. For example, the school districts, recognizing their statutory obligation to provide some level of guidance counseling, but fearful of a lawsuit, may provide resource materials for students use, but not provide any assistance in interpreting those materials. A student may come to the guidance center, ask the guidance counselor for help, only to have the guidance counselor point to a book and refuse to assist the student any further.

Second, allowance of recovery would be too likely to open the way for fraudulent claims. It is unlikely that every licensed professional school counselor recalls the factual circumstances of each and every bit of advice given to perhaps hundreds of students during the course of the year. It would not be difficult for individuals to claim that particular advice was given and it would be difficult

for the school district to conclusively disprove an allegation of erroneous advice. Justice Sundby has noted that the court's "burdensome and rapidly expanding caseload is hugely contributed to by governmental and public officer tort liability actions." Walker v. University of Wis. Hosp., 198 Wis. 2d 237, 253, 542 N.W.2d 207, 214 (Ct. App. 1995) (Sundby, J., concurring). Since settlements of lawsuits have become the norm due to the high cost of protracted litigation, the potential expense to Wisconsin taxpayers is immense.

Third, allowance of recovery under these circumstances would enter a field that has no sensible or just stopping point. Would school districts be responsible for the payment of college tuition alone, or would additional damages be reasonable if a student can show that he or she was not able to get into their preferred school which could have led to a professional career that otherwise might not be available to that student due to the advice given by a school counselor? As the trial court noted, allowing the Scotts' claims to proceed would open the floodgates and school districts (as well as other municipal entities) would be overwrought with costly, fact-intensive litigation. (A-Ap. 8.)

The public policy of encouraging interaction between high school guidance counselors and students must be

preserved to maintain the flow of necessary information to students. A finding against immunity under these circumstances will discourage guidance counselors from advising students beyond the bare minimum required by law. If this Court were to reverse the appellate court, the trial court, and its own precedent to permit exposure to liability, school districts may be in the position of making avoidance of liability their prime concern rather than promoting the general welfare of their students.

CONCLUSION

The Court of Appeals properly affirmed the trial court's dismissal of the Scotts' contract and promissory estoppel claims because their claims against the District sound in tort, not contract. Likewise, the Court of Appeals properly upheld the trial court's dismissal of the Scotts' negligence claims.

On the one hand, the state legislature requires school districts to provide guidance counseling services. On the other, it provides school districts with the protection of immunity for the exercise of this discretionary/quasi-judicial duty. Kierstyn and Kimps are binding precedent directly on point and Lodl clarifies that the professional discretion exemption/Scarpaci rule does not apply here. The District, therefore, respectfully submits that the Court of

Appeals' decision affirming the trial court's dismissal of the Scotts' claims in their entirety should be affirmed.

Dated this 3rd day of January, 2003

RUDER, WARE & MICHLER, L.L.S.C.
Attorneys for Savers Property and Casualty Insurance Company and Stevens Point Area Public School District

By: Cari Westerhof
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CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced using monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 41 pages.

Dated: this 3rd day of January, 2003

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APPENDIX OF DEFENDANTS-RESPONDENTS
SAVERS PROPERTY AND CASUALTY INSURANCE COMPANY AND
STEVENS POINT AREA PUBLIC SCHOOL DISTRICT

TABLE OF CONTENTS

STATE OF WISCONSIN CIRCUIT COURT PORTAGE COUNTY

RYAN SCOTT,
1921 Adams Street
Plover, WI 54467,

and

KATHY AND PATRICK SCOTT,
husband and wife,
1921 Adams Street
Plover, WI 54467,

Plaintiffs,

vs.

SAVERS PROPERTY AND CASUALTY INSURANCE COMPANY,
A Foreign Insurance Corporation,
Overland Park, KS 66210,

WAUSAU UNDERWRITERS INSURANCE COMPANY,
A Domestic Insurance Corporation,
P.O. Box 8017
Wausau, WI 54402-8017,

and

STEVENS POINT AREA PUBLIC SCHOOL DISTRICT,
A Municipal Corporation,
1900 Polk Street
Stevens Point, WI 54481,

Defendants.

AMENDED COMPLAINT

Case No.: 00-CV-286

Other Contracts/Unclassified

Case Code: 30303/30703

Plaintiffs, Ryan Scott and his parents, Kathy and Patrick Scott, by their attorneys, Anderson, Shannon, O'Brien, Rice & Bertz, as and for an Amended Complaint against the defendants allege and show to the court as follows:

1. Repeat and reallege each and every allegation set forth in the original Complaint presently on file with the court, with the sole exception of Paragraph 3. A true and accurate copy of the said Complaint is attached hereto as Exhibit A and incorporated herein by reference.

2. Upon information and belief, Savers Property and Casualty Insurance Company is a foreign insurance corporation with its principal office and place of business in Overland Park, Kansas and is not authorized to do business in the State of Wisconsin.

3. Upon information and belief, Savers Property and Casualty Insurance Company issued a policy of liability insurance to the Stevens Point Area Public School District in the State of Wisconsin and the said policy was in full force and effect at all times material hereto covering the Stevens Point Area Public School District and all of its officers, agents and employees including guidance counselor, Mr. Dave Johnson, for the acts and omissions alleged herein and pursuant to Wis. Stats., §§632.24 and/or 803.04(2) is directly liable to the plaintiffs for their damages and/or is a proper party to this action.

4. The Wausau Underwriters Insurance Company is, upon information and belief, a domestic insurance corporation with its principal office and place of business located at P.O. Box 8017, Wausau, Wisconsin 54402-8017, and the said company is duly authorized to conduct business as an insurance company in the State of Wisconsin.

5. Upon information and belief, Wausau Underwriters Insurance Company issued a policy of insurance in the State of Wisconsin to the Stevens Point Area Public School District and the said policy was in full force and effect at all times material hereto covering

the Stevens Point Area Public School District and all of its officers, agents and employees including guidance counselor, Mr. Dave Johnson, for the acts and omissions alleged herein and pursuant to Wis. Stats., §§632.24 and/or 803.04(2) is directly liable to the plaintiffs for their damages and/or is a proper party to this action.

WHEREFORE, plaintiffs demand judgment against the defendants, jointly and severally, for compensatory damages in an amount to be fairly and reasonably set by the finder of fact together with their costs, disbursements and attorney's fees as permitted by law and such further and other relief as the court may deem just and equitable.

Dated this 16th day of May, 2001.

ANDERSON, SHANNON, O'BRIEN, RICE & BERTZ

By _____
Russell T. Golla
A Member of the Firm
Attorneys for Plaintiffs
1257 Main Street, P.O. Box 228
Stevens Point, WI 54481-0228
Telephone: 715/344-0890
State Bar No.: 1010152

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COPY

STATE OF WISCONSIN CIRCUIT COURT PORTAGE COUNTY

RYAN SCOTT,
1921 Adams Street
Plover, WI 54467,

and

KATHY AND PATRICK SCOTT,
husband and wife,
1921 Adams Street
Plover, WI 54467,

Plaintiffs,

vs.

ABC INSURANCE COMPANY,
A party designated by fictitious name pursuant to
Wis. Stats., §807.12,

and

STEVENS POINT AREA PUBLIC SCHOOL DISTRICT,
A Municipal Corporation,
1900 Polk Street,
Stevens Point, WI 54481,

Defendants.

SUMMONS

Case No.: 00-CV-256

Other Contracts/Unclassified

Case Code: 30303/30703

THE STATE OF WISCONSIN:

To each person named above as a defendant:

You are hereby notified that the plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the

EXHIBIT
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requirements of the statutes. The answer must be sent or delivered to the court, whose address is 1516 Church Street, Stevens Point, Wisconsin 54481, and to Anderson, Shannon, O'Brien, Rice & Bertz, plaintiffs' attorneys, whose address is 1257 Main Street, P.O. Box 228, Stevens Point, Wisconsin 54481. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 16th day of October, 2000.

ANDERSON, SHANNON, O'BRIEN, RICE & BERTZ

By _____
Russell T. Golla
A Member of the Firm
Attorneys for Plaintiffs
1257 Main Street, P.O. Box 228
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RTG:sbs/134315 9/29/00 20,757

COPY

STATE OF WISCONSIN CIRCUIT COURT PORTAGE COUNTY

RYAN SCOTT,
1921 Adams Street
Plover, WI 54467,

and

KATHY AND PATRICK SCOTT,
husband and wife,
1921 Adams Street
Plover, WI 54467,

Plaintiffs,

vs.

ABC INSURANCE COMPANY,
A party designated by fictitious name pursuant to
Wis. Stats., §807.12,

and

STEVENS POINT AREA PUBLIC SCHOOL DISTRICT,
A Municipal Corporation,
1900 Polk Street,
Stevens Point, WI 54481,

Defendants.

COMPLAINT

Case No.: 00-CV-286

Other Contracts/Unclassified

Case Code: 30303/30703

Plaintiffs, Ryan Scott and his parents, Kathy and Patrick Scott, by their attorneys, Anderson, Shannon, O'Brien, Rice & Bertz, as and for a complaint against the defendants allege and show to the court as follows:

1. Ryan Scott is an adult resident of Portage County, Wisconsin, residing at 1921 Adams Street, Plover, Wisconsin and is a student at the University of Wisconsin Stevens Point.

2. Kathy and Patrick Scott, husband and wife, are the parents of Ryan Scott and they are adult residents of Portage County, Wisconsin, residing at 1921 Adams Street, Plover, Wisconsin and are employed by employers in Portage County and in the Stevens Point Area Public School District.

3. Upon information and belief, ABC Insurance Company issued a policy of insurance in the State of Wisconsin to the Stevens Point Area Public School District and the said policy was in full force and effect at all times material hereto covering the Stevens Point Area Public School District and all of its officers, agents and employees including guidance counselor, Mr. Dave Johnson, for the acts and omissions alleged herein and pursuant to Wis. Stats., §§632.24 and/or 803.04(2) is directly liable to the plaintiffs for their damages and/or is a proper party to this action. It is being designated by a fictitious name pursuant to Wis. Stats., §807.12 because its true name is unknown.

4. The Stevens Point Area Public School District is, upon information and belief, a municipal corporation duly organized and existing under the laws of the State of Wisconsin as a public school district.

5. Plaintiffs reside within the boundaries of the Stevens Point Area Public School District and plaintiffs Kathy and Patrick Scott are homeowners owning property within the Stevens Point Area Public School District and have, at all times material hereto, paid property tax including the school district levy and continue to pay property tax and the school district levy to the Stevens Point Area Public School District as well as state income taxes.

6. At all times material hereto, Ryan Scott was a student at the Stevens Point Area Senior High School (SPASH).

7. Ryan Scott graduated from SPASH in May of 1998 with a grade point average of 3.27 and a class rank of 215 out of a class of 660 students. Ryan Scott met all of the State of Wisconsin and the Stevens Point Area Public School District requirements for graduation from SPASH.

8. During his years of attendance at SPASH, Ryan Scott played hockey for the SPASH Panthers.

9. While a junior at SPASH, Ryan Scott believed that he was good enough to attract the attention of National Collegiate Athletic Association (NCAA) Division I hockey programs and potentially secure a full four year athletic scholarship to such a program for hockey.

10. Pursuant to Wis. Stats., §121.02(1)(e) and Wis. Admin. Code P.I., §8.01(2)(e), the Stevens Point Area Public School District was and is obligated to provide guidance and counseling services to students in the schools in the district including SPASH.

11. In accordance with that directive, SPASH, as specifically stated in its educational planner for the school years in question, including, but not limited to the 1997-1998 school year, offered guidance and counseling services and encouraged students to use those services and held the persons identified as "SPASH School Counselors" out to the public and to Ryan Scott and his parents as having "years of experience and expertise" in

course advising, career counseling and the provision of scholarship and financial aide information.

12. Dave Johnson was identified by the Stevens Point Area School District and SPASH as one such professional counselor and he was assigned to Ryan Scott as his guidance counselor.

13. Upon information and belief, Dave Johnson was, at all times material hereto and presently is, a licensed professional school counselor meeting the requirements of Wis. Admin. Code P.I., §3.49 and had been certified as such to the Wisconsin Department of Public Instruction by the Stevens Point Area Public School District pursuant to Wis. Stats., §121.02(1)(a) and Wis. Admin. Code. P.I., §8.01(2)(a).

14. When he was a junior at SPASH, Ryan Scott and his parents met with Dave Johnson and made it very clear to Mr. Johnson that Ryan was endeavoring to try to obtain a scholarship to an NCAA Division I school and wanted to make sure that he fulfilled all of the requirements including the course requirements which the NCAA refers to as the NCAA approved core courses.

15. Ryan and his parents specifically asked Mr. Johnson as a school guidance counselor employed by the Stevens Point Area Public School District at SPASH if he would agree to counsel Ryan so that he could achieve that goal and specifically achieve the goal of taking the courses that would be necessary to meet the NCAA approved core courses for the purpose of establishing initial eligibility certification status as a student athlete to a Division I school.

16. Mr. Dave Johnson, for and on behalf of the Stevens Point Area Public School District and as an agent and employee of the district, agreed to provide guidance and counseling services to Ryan and specifically agreed to advise him of and help him select the courses offered by SPASH which had been confirmed by the NCAA Initial Eligibility Clearinghouse as NCAA approved core courses and to aide him in selecting those courses.

17. Prior to November of 1997, SPASH had submitted a list of all courses offered by it together with a description of the content of all such courses to the NCAA through its agent, the NCAA Initial Eligibility Clearinghouse, for a determination as to which courses offered by it met and which courses offered by it did not meet the criteria used by the NCAA for determining whether such courses could be confirmed to be NCAA approved core courses.

18. Prior to November of 1997, the NCAA, through its agent, the NCAA Initial Eligibility Clearinghouse, advised SPASH in writing of those courses which were confirmed as NCAA approved core courses and those courses which were not approved as NCAA core courses. An English course offered by SPASH and titled "Broadcast Communication" was specifically included on the notifications which the NCAA Initial Eligibility Clearinghouse sent to SPASH prior to November of 1997 as a course that was not approved as an NCAA core course. The said notifications were received by SPASH prior to November of 1997.

19. In November of 1997, Ryan Scott and his mother met with Dave Johnson for, among other reasons, the purpose of selecting the courses that Ryan would take during the

second semester of his senior year in order to both graduate from SPASH and receive an initial eligibility certification from the NCAA as a student athlete eligible for athletic scholarship aide from a Division I school. During that meeting, Dave Johnson, on behalf of the Stevens Point Area Public School District, reaffirmed his agreement to counsel and advise Ryan on those courses he needed to take in order to both graduate from SPASH and receive initial eligibility certification as a student athlete by the NCAA.

20. Specifically, during the course of this meeting, Ryan told Mr. Johnson that he was interested in taking Broadcast Communication and he and his mother specifically asked Dave Johnson if Broadcast Communication was an NCAA approved core course.

21. Dave Johnson specifically advised Ryan and his mother that Broadcast Communication was an NCAA approved core course and based on Dave Johnson's advice and guidance, Ryan took Broadcast Communication the second semester of his senior year and received a grade of "A" in that course.

22. After graduating from SPASH in May of 1998, Ryan played hockey in Iowa in a junior league.

23. By national letter of intent dated July 20, 1999, Ryan was offered a full four year scholarship to play Division I hockey at the University of Alaska Anchorage. On July 21, 1999, Ryan and his parents accepted that scholarship offer. That scholarship offer through the national letter of intent was specifically conditioned upon receipt of initial eligibility certification from the NCAA.

24. After receipt of Ryan's final transcripts from SPASH, the NCAA determined

that Ryan was not eligible for a Division I student athlete scholarship because he did not fulfill the core course requirements relative to English solely as a result of taking the Broadcast Communication non-approved course the second semester of his senior year.

25. Ryan met all of the academic requirements set by the University of Alaska Anchorage for admission. However, because he took the Broadcast Communication course as a second semester senior, he was declared ineligible by the NCAA for a Division I athletic scholarship and, as a result, lost that scholarship.

26. Pursuant to Wis. Stats., §118.26, the plaintiffs complied with the notice of circumstances and notice of claim requirements set forth in Wis. Stats., §893.80(1). Specifically, plaintiffs advised the Stevens Point Area Public School District of the circumstances of the claim by advising counselor Dave Johnson, school district Superintendent, Emory Babcock and SPASH Principal Edward Von Feldt of the NCAA's action and the basis for its action and the school district through Dave Johnson, Edward Von Feldt, the teacher who designed the course, Carol Kolbe and the Stevens Point Area Public School District Administrator for Curriculum and Instruction, Donna Schultz-Looker, participated in an unsuccessful appeal of the NCAA's disqualification of Ryan Scott and its determination that the Broadcast Communication course was a non-approved core course.

27. On February 3, 2000, plaintiffs served a claim on the Stevens Point Area Public School District by serving the same on its Superintendent, Emory Babcock and also served a claim on the specific counselor involved, Dave Johnson. No notice of

disallowance was ever served and that claim has been deemed denied pursuant to Wis. Stats., §893.80(1g).

BREACH OF CONTRACT

28. Repeat and reallege each and every allegation set forth in paragraphs 1 through 27 above and incorporate the same herein as if set forth verbatim.

29. The plaintiffs and defendant, Stevens Point Area Public School District through its agent and employee, Dave Johnson, entered into a contract whereby Dave Johnson specifically agreed to provide guidance and counseling services to Ryan Scott and Kathy and Patrick Scott on behalf of their son Ryan agreed to pay, at least in part, for guidance and counseling services as taxpayers in this school district through the school tax levy portion of their property taxes and in other respects.

30. Specifically as to Ryan Scott, the Stevens Point Area Public School District through Dave Johnson agreed to advise and counsel him to take courses that were NCAA approved core courses.

31. The Stevens Point Area Public School District through Dave Johnson breached its contract with Ryan Scott and his parents, Kathy and Patrick Scott, by advising and counseling them that the Broadcast Communication course offered by SPASH was an NCAA approved core course when in fact it had never received approval as an NCAA approved core course and it, as of the commencement of the 2000-2001 school year, has not received NCAA core course approval.

32. As a result of the said breach of contract, the plaintiffs have been damaged in

that Ryan Scott has lost a full four year scholarship to the University of Alaska Anchorage and Ryan, Kathy and Patrick Scott have incurred substantial expenses as a direct, contemplated and expected result of the loss of that scholarship.

PROMISSORY ESTOPPEL

33. Repeat and reallege each and every allegation set forth in paragraphs 1 through 32 above and incorporate the same herein as if set forth verbatim.

34. The Stevens Point Ares Public School District set Dave Johnson up in a position which gave rise to a special relationship between him and Ryan Scott as Ryan Scott's advisor and guidance counselor.

35. The Stevens Point Ares Public School District fostered and encouraged a trusting relationship between the plaintiffs and Dave Johnson as Ryan's advisor and guidance counselor.

36. The promise made by Dave Johnson to the plaintiffs to advise, guide and counsel Ryan Scott to select courses that were NCAA approved core courses and the statement and affirmation that Broadcast Communication was an NCAA approved core course constituted a promise and affirmation that Dave Johnson should reasonably have expected to induce the plaintiffs and, in particular, Ryan to enroll in Broadcast Communication for the second semester of his senior year.

37. The said promise and affirmation in fact induced Ryan to enroll in Broadcast Communication the second semester of his senior year.

38. Injustice can only be avoided by enforcement of the promise and an award of

damages to the plaintiffs.

39. As a result of their reliance on the said promise and affirmation, the plaintiffs have been damaged in that Ryan Scott has lost a full four year scholarship to the University of Alaska Anchorage and Ryan, Kathy and Patrick Scott have incurred substantial expenses as a direct contemplated and expected result on their reliance on the said promise and affirmation and the loss of that scholarship.

NEGLIGENCE

40. Repeat and reallege each and every allegation set forth in paragraphs 1 through 39 above and incorporate the same herein as set forth verbatim.

41. At all times material hereto, Dave Johnson and Ryan Scott were in a special, trusting relationship.

42. At all times material hereto, Dave Johnson was acting as a professional, licensed advisor and guidance counselor.

43. Dave Johnson failed to exercise reasonable care in advising Ryan Scott and his parents that Broadcast Communication was an NCAA approved core course when in fact it was not and inducing Ryan to enroll in that course and inducing Kathy and Patrick to have Ryan enrolled in that course.

44. Dave Johnson's negligence caused Ryan Scott to lose the full four year scholarship to the University of Alaska Anchorage.

45. As a result of Dave Johnson's causal negligence, the plaintiffs have sustained substantial damages including, but not limited to, the financial value of a full four year

scholarship to the University of Alaska Anchorage, the emotional distress resulting from the loss of that scholarship and the loss of all opportunities associated with such a scholarship and the ability to play for a prestigious NCAA Division I hockey program.

WHEREFORE, the plaintiffs demand judgment against the defendants for compensatory damages in amounts to be fairly and reasonably set by the finder of fact together with their costs, disbursements and attorney's fees as permitted by law and such further and other relief as the court may deem just and equitable.

Dated this 16th day of October, 2000.

ANDERSON, SHANNON, O'BRIEN, RICE & BERTZ

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STATE OF WISCONSIN
SUPREME COURT

RYAN SCOTT, KATHY SCOTT and
PATRICK SCOTT,

Plaintiffs-Appellants-Petitioners,

APPEAL NO. 01-2953

v.

SAVERS PROPERTY AND CASUALTY
INSURANCE COMPANY, and
STEVENS POINT AREA PUBLIC
SCHOOL DISTRICT,

Defendants-Respondents,

WAUSAU UNDERWRITERS
INSURANCE COMPANY,

Defendant.

APPEAL FROM THE CIRCUIT COURT OF PORTAGE COUNTY
THE HONORABLE JAMES MASON, PRESIDING
TRIAL COURT CASE NO. 00-CV-286

REPLY BRIEF OF PLAINTIFFS-APPELLANTS-PETITIONERS, RYAN SCOTT, KATHY SCOTT AND PATRICK SCOTT

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INTRODUCTION

The District acknowledges that Wis. Stat., § 121.02(1)(e) and Wis. Admin. Code P.I. § 8.01(2)(e) obligate it to provide guidance and counseling services including the specific post-secondary planning, guidance and counseling services requested by the Scotts, namely, to counsel Ryan to take the courses needed to meet the NCAA approved core course curriculum. District Brief at pp. 6, 12, 25 and 28-29. Yet, it uses these admitted legal obligations as a sword, to try to defeat the Scotts' contract and promissory estoppel claims, and as a shield against the negligence claims. In a jurisdiction where municipal immunity was abolished except for "legislative or judicial or quasi-legislative or quasi-judicial functions," *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962), subjecting Wisconsinites victimized by municipal misfeasance to this whipsaw is indefensible.

The plaintiffs repeat: the failure to make the School District accept responsibility and hold it accountable for the provision of information that can be easily and readily verified by reference to documents in its possession is anachronistic and renders the duties imposed on the District

by Wis. Stat., § 121.02(1)(e) and Wis. Admin. Code P.I. § 8.01(2)(e) meaningless.

THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED FOR BREACH OF CONTRACT

The District contends that the Scotts' breach of contract claim is a tort in contract clothing. It also asserts that even if the parties engaged in some bargaining, the ultimate deal struck between them is not supported by consideration. The basis for both claims is: since the District had the "legal duty" to provide counseling services, the claim for a breach of that duty is a tort; and, Johnson entered into the agreement to counsel Ryan to take the courses required by the NCAA pursuant to that "legal duty"–therefore, the agreement was not supported by any consideration. The District's analysis of the facts and law is wrong.

The Parties Bargained For Performance

In its Educational Planner, SPASH specifically offered to provide guidance and counseling services to its students. A.App. p. 17. In traditional contract analysis, this offer and the Scotts' conduct in seeking out and utilizing the counseling

services might be classified as a "unilateral contract"–an offer which invites acceptance by performance.[1] *See, Compton v. Shopko Stores, Inc.*, 93 Wis. 2d 613, 625, 287 N.W.2d 720 (1980).

When the parties met, however, they bargained for specific services: the Scotts asked Johnson if he would agree to counsel Ryan to take the courses necessary to fulfill the NCAA's approved core course curriculum and Johnson specifically agreed to do so. This exchange created a contract regardless of whether the District and Johnson were obligated to provide general guidance and counseling services. 17A Am. Jur. 2d *Contracts*, § 164 at p. 179.

The So-Called Preexisting Legal Duty Rule Does Not Apply

Citing the preexisting legal duty rule discussed in *Holcomb v. United States*, 622 F.2d 937 (7th Cir. 1980), 17A Am. Jur. 2d *Contracts*, § 144 and the Restatement (Second) of Contracts, § 76, the District argues that since it was legally obligated to provide "post-secondary planning" services, there

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[1]Utilization of this service by students would have to be considered a "benefit" to the District and as such, "consideration."

was no consideration for Johnson's promise. The District's reliance upon this rule is misplaced. **It does not apply to defeat a claim by the promisee**, the Scotts. Rather, **it applies to defeat a potential claim by the promisor**, Johnson, on any promise extracted from the promisee for the performance of that legal duty. *See*, Restatement, *supra*, § 73 Comment b at p. 180 ("A bargain by a public official to obtain private advantage for performing his duty is therefore unenforceable as against public policy. . . . And under this section performance of the duty is not consideration for a promise.") *See also Williston on Contracts*, Vol. 1, § 132 (3d ed. 1957), pp. 557-563 citing *Hatch v. Mann*, 15 Wend. 44, 48-49 (New York 1835) for the following statement of the rule:

> ". . . I say, 'this is a most shameful and scandalous action,' and it would not, I am confident, have obtained the countenance of any court, had its principle been duly considered. That a public officer, whose fees are prescribed by law, may maintain an action to recover an additional sum promised him by a party for doing his official duty, is a monstrous proposition, fraught with every kind of mischief."

Id. at 48-49. In *Ferraro v. Koelsch*, 124 Wis. 2d 154, n. 5 at 168-69, 368 N.W.2d 666 (1985), this Court appeared to agree with the foregoing explanation of the rule.

Therefore, the District's reliance upon the preexisting legal duty rule is misplaced.

There Was Consideration For The Promise To Counsel Ryan To Take NCAA Approved Core Courses

Williston on Contracts, *supra*, § 103, at pp. 395-396, summarized the concept of consideration as follows:

> "Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are sufficient consideration for one another."

Johnson, as promisor, undertook the act of performing services which were thought to be beneficial to the promisee, the Scotts, and the Scotts, as promisee, agreed to utilize his services and **continue** to enroll their son Ryan as a student at SPASH. These mutual promises are consideration.

Actually, the District is claiming that the consideration for Johnson's promise was "inadequate." The adequacy of the consideration is not subject to judicial review. As

Williston, supra, states: "It is an 'elementary principle that the law will not enter into an inquiry as to the adequacy of consideration.'" *Id.* § 115, p. 454. *See also, Rust v. Fitzhugh*, 132 Wis. 549, 557-558, 112 N.W. 508 (1907). Thus, the District's arguments that the Scotts' promise to use its services and continue to enroll Ryan at SPASH was inadequate consideration for Johnson's promise is meritless.

Further, and most importantly, the existence of the District's legal obligation is sufficient consideration to support Johnson's promise to counsel Ryan to take the courses needed to fulfill the NCAA core course curriculum. The rule that is directly on point was quoted at page 16 of our initial Brief and will not be repeated here. 17A Am. Jur. 2d *Contracts* §164, **Existing legal or equitable obligations**, at p. 179.

One of the cases cited in support of this principle, *Ward v. Goodrich*, 34 Colo. 369, 82 P. 701 (Colo. 1905) explains it in the context of the preexisting legal duty rule. In *Ward*, a husband argued that his promise to pay child support

was not supported by consideration because he was legally bound to do so anyway. The court rejected this claim stating:

> "Counsel labors under a misapprehension as to the application of the rule he invokes. While it is settled that the promising to do, or the doing of, that which the **promisor** [emphasis added] is already legally bound to do does not, as a rule, constitute a consideration for a **reciprocal promise** [emphasis added], or support **a reciprocal undertaking given by the promisee, it by no means follows that such promise may not be enforced against such promisor by the promisee, although its enforcement compels the performance of that which was already a legal obligation.**" [Emphasis added]

Id. at 34 Colo. 372-73 and 82 P. 702.

Claims For Breach Of Contract And Negligence Which Arise Out Of The Same Transaction Are Not Inconsistent

At pages 5 and 6 of its Brief, the District appears to argue that the prosecution of claims for breach of contract and negligence are somehow inconsistent and that the Scotts' claims should be recast solely as claims for negligence. The basis for this assertion seems to be that the District's duty to provide the specific counseling requested by the Scotts arose solely by statute. This premise is false. Although the District had the general duty to provide counseling, this case arises out of a request by the Scotts for very specific counseling services and Johnson's assent to that request and promise to perform

those services. Therefore, as set forth above, the transaction between the parties gives rise to a claim for breach of contract. Nevertheless, the same set of facts can give rise to claims for both breach of contract and negligence. *See e.g.*, *Brooks v. Hayes*, 133 Wis. 2d 228, 395 N.W.2d 167 (1986).

THE COMPLAINT ASSERTS A CLAIM UPON WHICH RELIEF MAY BE GRANTED FOR PROMISSORY ESTOPPEL

The District claims: (1) the theory of promissory estoppel applies only to commercial transactions, i.e., "business dealings;" and (2) the facts alleged in the complaint fail to meet two elements of this doctrine.

Promissory Estoppel Applies In Non-Commercial Settings

The doctrine of promissory estoppel adopted in *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 694, 133 N.W.2d 267 (1965) is now embodied in the Restatement (Second) of Contracts, § 90, p. 242 (1979). *Stack Constr. Co. v. Continental Constr. Corp.*, 88 Wis. 2d 637, 641-43, 277 N.W.2d 769 (1979). The last phrase of Comment a to § 90 states that it applies in a wide variety of **non-commercial situations**. *Id.* at p. 243. In fact, the first illustration of the

application of this principle involves a non-commercial context: A knowing that B is going to college promises to give B $5,000 upon completion of his course. *Id.* at 243. Therefore, the District's claim that promissory estoppel does not apply in this context is meritless.

All Of The Elements Of Promissory Estoppel Are Present

The District admits that the first *Hoffman* element has been met. It claims that the Scotts cannot satisfy the inducement element because they did not rely on a "promise." This assertion simply isn't true. The Scotts relied on Johnson's promise to counsel Ryan to take NCAA approved core courses and that reliance induced action of a definite and substantial character on the part of Ryan, namely, he took the courses which Johnson told him to take, one of which, Broadcast Communication, was not an approved core course.

The District and the Court of Appeals attempt to make an unsound distinction between a **promise** and a **representation**. The American Heritage Dictionary of the English Language (1978) defines "promise" as, "A declaration assuring that one will or will not do something."

Id. at p. 1047. "Representation" is defined as, "A statement of fact made by one party in order to induce another party to enter into a contract." A guidance counselor's "promise" to counsel a student to take the courses necessary to meet the NCAA approved core course curriculum cannot be separated from the "representation" that the courses which the counselor tells the student to take are approved core courses. The representation is the reasonable and expected result of the promise. In the very least, Johnson's promise to counsel Ryan to take the courses needed to meet the NCAA approved core course curriculum carried with it the implied promise that the courses he told Ryan to take were approved.

The District argues that the absence of "formality" defeats the Scotts' promissory estoppel claim. The formality concept as discussed in *Silberman v. Roethe*, 64 Wis. 2d 131, 146, 218 N.W.2d 723 (1974) involves a review of the nature of the transaction and the sophistication of the parties for the purpose of determining whether it would be reasonable to expect the transaction to be formalized or memorialized in writing. This concept does not apply here. The transactions

between the Scotts and Johnson were not the type of "commercial transactions" that one might expect to be formalized. The parties were not sophisticated businessmen. The manner in which these transactions were conducted is exactly what one would expect in a guidance counselor/student relationship.

Public policy should weigh in favor of assuring that guidance counselors disseminate accurate information to the high school students who are relying on that information to make very significant decisions regarding their future. Injustice can be avoided in this case by enforcing Johnson's promise and awarding the damages sustained by Ryan and his parents as a result of the loss of the scholarship.

THE DISTRICT AND JOHNSON ARE NOT ENTITLED TO IMMUNITY

The arguments propounded at pages 28 through 53 of the Scotts' initial Brief adequately respond to those set forth at pages 22 through 35 of the District's Brief. However, the following points need to be emphasized.

If this Court is to remain true to the precedent of *Holytz, supra* and *Lifer v. Raymond*, 80 Wis. 2d 503, 511-12,

259 N.W.2d 537 (1977), then municipal immunity can only be extended to acts which involve the exercise of discretion or judgment in the performance of governmental functions. In the words of *Lifer, supra* at 511-512: "A quasi-legislative act involves the exercise of discretion or judgment **in determining the policy to be carried out or the rule to be followed**. A quasi-judicial act involves the exercise of discretion and judgment **in the application of a rule to specific facts.**" [Emphasis added]. Such acts, along with legislative and judicial functions are obviously "governmental."

There is not one assertion by the District in its Brief that Johnson's conduct involved the exercise of this type of discretion or judgment. The policy had already been determined by the legislature and carried out by the District: the District was required to establish a guidance and counseling program and did so. The provision of the service dictated by the policy can in no way be characterized as governmental–quasi-legislative or quasi-judicial. *See, Holytz, supra* at 39-40 citing *Hargrove v. Cocoa Beach*, 96 So. 2d

130, 133 (Fla. 1957) which in turn cites *Elrod v. City of Daytona Beach*, 132 Fla. 24, 180 So. 378 (Fla. 1938) and *City of Lakeland v. Amos*, 106 Fla. 873, 143 So. 744 (Fla. 1932), as the authorities to be used in defining, "legislative, quasi-legislative, judicial and quasi-judicial functions."

It is difficult to imagine that the type of judgment or discretion sufficient to trigger application of quasi-legislative or quasi-judicial function immunity exists in this case. Johnson only had to review the form 48H in his office and advise the Scotts accordingly. Doing so would not involve the exercise of governmental discretion or judgment.

The District merely asserts that it need only prove that Johnson's activities were "discretionary." District Brief at page 25. Its analysis is flawed because *Lifer* and *Holytz* clearly envisioned governmental discretion or judgment before immunity would apply. The immunity set forth in Wis. Stat., § 893.80(4) is an affirmative defense. *Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 21, 34-35, 559 N.W.2d 563 (1997). Since the District failed to establish that Johnson's conduct involved the type of quasi-legislative or quasi-

judicial function immunized by Section 893.80(4), the burden did not shift to the Scotts to establish an exception to that immunity or that Johnson's conduct was "ministerial." Nevertheless, as argued in the Scotts' initial Brief, the ministerial act and professional judgment exceptions apply.

THE FLOOD GATES WILL NOT OPEN

The flood gates did not open after *Holytz*. They will not open if this Court reaffirms the *Holytz* court's preservation of immunity **only for** acts performed in the exercise of legislative, judicial, quasi-legislative or quasi-judicial functions. Yes, municipalities will incur additional liability. However, given the "caps" which the legislature has placed on that liability and the money, energy and resources devoted by the citizens, municipalities and courts of this state to litigating the issue of entitlement to "discretionary act" immunity, the balance weighs heavily in favor of limiting immunity to that intended by the legislature when it adopted **only** the immunity preserved by this Court in *Holytz*.

The District claims this decision is for the legislature. This Court, in *Holytz*, disagreed. Nevertheless, the legislature

made its decision when it adopted the language contained in Wis. Stat., § 893.80(4) verbatim from the *Holytz* decision. *Id.* at 40. Since the doctrine of municipal immunity is an unjust creation of the common law, *Holytz, supra* at 37-39, and the legislature did nothing more than adopt this Court's preservation of municipal immunity solely for legislative, quasi-legislative, judicial or quasi-judicial functions, this Court can and should return municipal immunity to the status intended by it in *Holytz*. *See, Schwanke v. Garlt*, 219 Wis. 367, 371, 263 N.W. 176 (1935) regarding the growth, adaptation and flexibility of the common law.

The District's fear of a multitude of student lawsuits has not been borne out by the history of such claims in Wisconsin. There would be no chilling effect on the provision of counseling services. Guidance counselors who engage in the conduct described at page 38 of the District's Brief should and would be fired by any responsible school district.

The claim that allowance of recovery to the Scotts would open the door for fraudulent claims is nothing but

unadulterated dung that is based solely on fear mongering and speculation. The fact that the parties have only been able to find a handful of similar cases in the reported decisions of the courts **of this country** dispels this argument.

The claim that there would be no sensible stopping point to allowance of recovery under the circumstances of this case is likewise meritless. The plaintiffs' burden of proof on damages, the rules of evidence applicable to that proof, the "caps" on such damages set forth in Wis. Stat., § 893.80(3) and the right to judicial review of any damage award all belie the "chicken little" claim that the District's potential liability on such claims could be ruinous.

CONCLUSION

The Scotts' Complaint asserts claims upon which relief may be granted under the theories of contract and promissory estoppel. Municipal immunity does not apply and this Court should return the law of municipal immunity to the status intended by it and the legislature as described in *Holytz*. The Scotts therefore respectfully submit that the Court of Appeals'

Decision should be reversed and this case remanded for further proceedings on all causes of action.

Dated this 16th day of January, 2003.

ANDERSON, O'BRIEN, BERTZ, SKRENES & GOLLA

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

☐ Typeset (12 point type, 2 point lead, 7" x 4-¼ inches centered on page)

☐ Typewritten (pica, 10 spaces per inch, non-proportional font, double-spaced, 1½ inch margins on left and 1 inch on other three sides)

■ Desk Top Publishing or Other Means (proportional serif font, min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 point and max of 60 char per line). The text is 13 point type and the length of the brief is 2,986 words.

Dated: January 16, 2003.

Signed,

Russell T. Golla
Attorney

STATE OF WISCONSIN
SUPREME COURT

RYAN SCOTT, KATHY SCOTT, and
PATRICK SCOTT,

Plaintiffs-Appellants-Petitioners,

v.

Circuit Court Case No.
00-CV-286

SAVERS PROPERTY AND CASUALTY
INSURANCE COMPANY, and STEVENS
POINT AREA PUBLIC SCHOOL DISTRICT,

Appeal No. 01-2953

Defendants-Respondents,

WAUSAU UNDERWRITERS INSURANCE COMPANY,

Defendant.

AMICUS CURIAE BRIEF OF WISCONSIN ACADEMY OF TRIAL LAWYERS

The Honorable James Mason, Presiding
Circuit Court Judge, Portage County

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STATEMENT OF AMICUS INTEREST

The Wisconsin Academy of Trial Lawyers (WATL) is comprised of lawyers representing individuals who have sustained significant personal injuries. The membership is committed to maintaining the traditional role of our system of tort law as a vehicle to fairly and adequately compensate those who have sustained injuries through the negligence of others. WATL believes that requiring those who negligently cause injury to assume responsibility for the consequences of their conduct is consistent with fundamental principals of fairness and the public policy of our state. Our concern in this case is the doctrine of discretionary immunity which has been broadly used to bar recovery against municipalities for concededly negligent conduct. The widespread application of this doctrine has effectively reinstated governmental immunity as the rule in our state in a manner inconsistent with judicial precedent and statute.

ARGUMENT

I. THE DISCRETIONARY IMMUNITY DOCTRINE, AS CURRENTLY APPLIED, IS INCONSISTENT WITH CASE LAW ABROGATING GOVERNMENTAL IMMUNITY AND WITH SEC. 893.80, STATS.

This court rejected the doctrine of municipal immunity in Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 18 (1962). In doing so, the court noted that the doctrine had been roundly criticized as arising from, "the ancient and fallacious notion that the King can do no wrong." Britton v. Eau Claire, 260 Wis. 2d 382, 51 N.W.2d 30 (1952). The court also criticized the doctrine as giving rise to highly artificial judicial distinctions.

After exploring both the history and the legal underpinnings of governmental immunity, the court abrogated the doctrine in language which was clear and unequivocal. "Perhaps clarity will be afforded by our expression that hence forward, so far as governmental responsibility for torts is concerned, the rule is liability - the exception is immunity." "By reason of the rule of respondeate [sic] superior, a public body shall be liable for the damages for the torts of its officers, agents and employees occurring in the course of the business of such public body." Holytz at 40.

The Holytz decision has never been overruled. The pivotal language in Holytz has been cited with approval on

a number of occasions by this court and the Court of Appeals.

The Supreme Court cited Holytz in Figgs v. City of Milwaukee, 121 Wis. 2d 44, 55, 357 N.W.2d 548 (1984) observing, "Following Holytz a city may be liable for damages caused by the negligence of its employee."

Holytz was also cited by the Court of Appeals in Harkness v. Palmyra-Eagle School District, 157 Wis. 2d 567, 460 N.W.2d 769 (Ct. App. 1990), "Sec. 893.80, Stats., was enacted in response to the Supreme Court's decision in Holytz v. Milwaukee (cite omitted), the case abrogating the historic common law doctrine of municipal tort immunity."

In Anderson v. City of Milwaukee, 208 Wis. 2d 18, 559 N.W.2d 563 (1997), this court confirmed the continuing viability of the Holytz decision, "When, in 1962, the court abrogated this (municipal immunity) doctrine, it stated: 'Henceforward, so far as governmental responsibility for torts is concerned the rule is liability - the exception is immunity."

The sweeping language of Holytz left no question the court intended that a remedy be available for a broad array of negligent acts on the part of municipalities. The court provided only a narrowly drawn exception, stating that liability would not be imposed, "on a governmental body in

the exercise of its legislative or judicial or quasi legislative or quasi judicial functions," Id. at 40. Neither the language nor logic of Holytz suggest this exception was to be broadly construed to defeat claims.

The court recognized the impact of its decision, expressly offering to defer to the legislature's view of public policy in this matter and inviting the legislature to reinstate immunity if it so chose. It also noted the legislature might impose limitations on claims against municipalities.

In response to Holytz the legislature enacted Sec. 331.43, now Sec. 893.80, adopting limitations and procedures requisite to maintaining a claim. The legislature did not reinstate governmental immunity and implicitly approved the approach taken by the Supreme Court in Holytz. The statutory scheme acknowledges liability as the rule, subject to the same narrowly drawn exception for legislative, quasi-legislative, judicial or quasi-judicial actions set forth in Holytz. Nothing in the language of the statute suggests an intent to provide broad immunity from claims.

Neither Holytz, its progeny, nor 893.80 support the resurrection of governmental immunity which has taken place under the rubric of discretionary immunity. The doctrine

of discretionary immunity is too familiar to this court to require a lengthy recitation of the series of cases which have dramatically altered the approach taken by the Holytz court and our legislature. The end result has been the transformation of the narrow exception for decisions which are legislative or judicial in character to a sweeping grant of immunity which makes liability not only the exception, but arguably more limited than it was prior to Holytz.

This startling transformation has been accomplished by accepting the dubious proposition that decisions of a legislative, judicial, quasi-legislative, or quasi-judicial nature are synonymous with the vastly broader category of discretionary acts. That has been combined with a sweeping definition of discretionary acts which subsumes all conduct where the performance of a duty is not absolute, certain and imperative. This approach ignores the fact that the court in Holytz neither used such language, nor gave any reason to believe that it would have supported such an interpretation. It cannot be reconciled with the pronouncements of this court in Holytz and Anderson or with the legislative approach embodied in 893.80, all of which recognize municipal liability as the rule.

The current theory of immunity rests upon an expansive definition of discretion. It has grown into a new rule of governmental immunity, in direct contravention to both the language and spirit of Holytz. The concept has now been given an interpretation of such breadth that it is increasingly rare to find a circumstance in which our courts will impose liability on a municipality for the acts of its employees.

We respectfully submit that the doctrine of discretionary immunity as currently applied sets the bar for government liability so high that immunity is not only the rule, but a virtual certainty. We ask the court to recognize that reality and return to the rule of liability enunciated in Holytz and followed by our legislature in 893.80.

II. A REVIEW OF THE CASES WHICH ARE THE FOUNDATION OF THE DISCRETIONARY IMMUNITY DOCTRINE REVEALS FUNDAMENTAL LEGAL AND LOGICAL FLAWS.

The current doctrine of discretionary immunity has its roots in two cases, Lister v. Board of Regents, 72 Wis. 2d, 282, 240 N.W.2d 610 (1976) and Lifer v. Raymond, 80 Wis. 2d 503, 259 N.W.2d 537 (1977). The Lifer case is cited for the proposition that all conduct which is discretionary is by definition legislative, judicial, quasi-legislative, or quasi-judicial in character, and thus falls within the

exception to the rule of liability announced in Holytz. This suspect interpretation have been combined with language drawn from the Lister case which limited an individual governmental employee's liability to ministerial acts which were described as absolute, certain and imperative.

Taken together, these concepts drastically limit liability, effectively reinstating governmental immunity as the rule. This has occurred despite the fact that neither Lister nor Lifer overruled, or in fact criticized, the Holytz decision. The Lister decision was expressly based upon an approach which accepted that individual governmental employees were entitled to immunity based on cases decided years before the rule of liability for claims against municipalities was adopted in Holytz. Both Lister and Lifer involve claims against individual governmental employees and cannot reasonably be read as modifying the Holytz rule for claims against municipalities.

Lister v. Board of Regents, supra, was a case brought by law students against the Board of Regents to recover the difference between non-resident and resident tuition. The Lister court relied on language drawn from cases involving claims against individual public officials which predated the Holytz decision and were grounded the concept of in

sovereign immunity and policy consideration specific to claims against individual employees. The court noted that under these cases an individual public officer was not personally liable to one injured, unless the injury stemmed from the negligent performance of a purely ministerial duty. The court concluded that individual liability was barred except where the duty was, "Absolute, certain and imperative involving merely the performance of a specific task when the law imposes, prescribes, and defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion." Lister at 301.

The Lifer decision also involved a claim against an individual state employee, and turned upon facts which would fairly be described as unusual. The plaintiff in Lifer brought suit against a road test examiner asserting it was negligent to issue an operators license to a defendant who stood 5'1" tall and weighed 320 lbs.

The Lifer court cited Lister for the proposition that a public officer was not personally liable to one injured as a result of actions which were not ministerial. The court went on to conclude that Holytz did not govern because it dealt only with actions against a governmental body, not actions against a public officer. While we

believe that is a strained reading of Holytz, Lifer does not support affording immunity for claims against municipalities or other governmental entities. That distinction appears to have been lost in the welter of cases that have cited Lifer for the proposition that municipalities are entitled to immunity for the discretionary acts of their employees.

There is an even more fundamental flaw in the reliance placed upon Lifer as one of the cornerstones for the discretionary immunity doctrine. In an effort to reconcile itself to the language of Holytz, the Lifer court equated discretionary acts with actions which were quasi-legislative or quasi-judicial in character. This curious conclusion was reached by first observing that quasi-legislative and quasi-judicial acts involve the exercise of discretionary judgment, and from that concluding, "As applied, the terms quasi-judicial 'or quasi-legislative' and 'discretionary' are synonymous in the two test results in the same finding."

This is simply not logically supportable. While quasi-judicial and quasi-legislative acts certainly involve the exercise of discretion, that does not convert every exercise of discretion into quasi-legislative or quasi-judicial conduct. The logic which is at the heart of the

Lifer decision is no different than contending that because all horses have four legs, all animals with four legs must be horses.

It is this fundamentally flawed analysis which is at the heart of our current approach to claims against municipalities. The logical flaw in Lifer, coupled with the misapplication of the ministerial act language in Lister to fact situations where it has no relevance have spawned a doctrine which cloaks the vast majority of negligent governmental acts with immunity. This renders Holytz a virtual nullity, and usurps the legislative scheme contained in Sec. 893.80, Wis. Stats.

III. DISCRETIONARY IMMUNITY HAS BEEN CONSTRUED SO BROADLY THAT IT SHIELDS CONDUCT WHICH IS EXECUTORY RATHER THAN DECISIONAL.

A number of decisions which rely upon the doctrine of discretionary immunity to bar governmental liability involve conduct properly characterized as executory rather than decisional. As the court acknowledged in Lifer, quasi-legislative and quasi-judicial acts are deliberative in nature, involving a determination of policy and/or the exercise of judgment in the application of a rule to specific facts. The far broader concept of discretion still implies a sifting and weighing of options. Simple

mistakes or failures in performance should not be immunized under the guise of discretion.

In fact, discretion has been invoked to shield a broad range of conduct that would more properly be characterized as the product of inattention or inadvertence rather than a sifting and winnowing of alternative courses of conduct. In Stann v. Waukesha County, 161 Wis. 2d 808, 468 N.W.2d 775 (1991), a claim for the wrongful death of a three-year old was barred by the discretionary immunity doctrine. The mother had repeatedly asked the lifeguards to search for the child but they had declined to do so until it was too late. In Barillari v. Milwaukee, 194 Wis. 2d 247, 533 N.W.2d 759 (1995), the court found the City of Milwaukee immune where the plaintiffs' daughter had been killed after city detectives failed to keep their promises to arrest her ex-boyfriend and to send a squad car to protect the woman. To categorically shelter conduct of this nature as discretionary is an injustice not only to those who sustain injury, but also to the public at large whose interests are compromised when public employees are not held to reasonable standards of conduct.

The decision in Kierstyn v. Racine Unified School District, 228 Wis. 2d 81, 596 N.W.2d 417 (1999) is emblematic of the problems which arise when a lack of

diligence or attention to responsibility is cloaked in the garb of discretionary immunity. Kierstyn involved a benefits specialist giving erroneous advice to the plaintiffs, although the answer was unambiguously set forth in the statutes. Because the court did not regard the conduct as ministerial, it granted immunity, although it is readily apparent that what occurred was not an exercise of discretion, but a simple mistake.

Characterizing the conduct in the present case as discretionary is also unwarranted. The counselor did not weigh alternatives and elect to provide inaccurate information. He simply failed to exercise ordinary care in obtaining and providing that information. Granting immunity to the school district for conduct of this sort not only ignores the Holytz rule of liability, but goes well beyond any defensible definition of discretionary acts.

Even were we to accept the broad concept of discretionary immunity, harm caused by the failure to properly execute a decision once taken should not be immunized. That is consistent with the general principle in our tort law that someone who undertakes a task, whether obliged to or not, must exercise reasonable care in its performance. It is also consistent with the decision of

this court in Firkus v. Rombalski, 25 Wis. 2d 352, 358, 130 N.W.2d 835 (1964), where the court held that while the initial decision to place a traffic sign was entitled to immunity, the failure to maintain that traffic sign was not. The court also recognized the distinction between decision and performance in Anderson v. City of Milwaukee, and in Coffey v. Milwaukee, supra.

IV. PUBLIC POLICY SUPPORTS A RETURN TO THE HOLYTZ STANDARD.

The court in Holytz carefully examined the arguments in favor of governmental immunity, and found them wanting. The State's legislature concurred with that judgment when it enacted Sec. 893.80, Wis. Stats.

Most of the cases advancing policy arguments in support of a grant of immunity do so in the context of claims against individual state employees. Those arguments are not material to claims against governmental entities. Moreover, there is a marked absence in the cases of any analysis of the benefits which flow to the public from holding governmental entities to the same reasonable standards of conduct required of the citizens those entities serve.

Given the times, the question of the potential financial impact of adhering to Holytz will likely occur.

The legislature effectively resolved those questions when it adopted Sec. 893.80, Wis. Stats. This court has on a number of occasions addressed itself to the reality that public bodies carry insurance for these risks. There is no reason to suppose that enforcing the rule of liability enunciated in Holytz will materially impact the financial well being of municipalities.

This court addressed itself directly to the question of economic impact in Wood v. Milin, 134 Wis. 2d 279, 289, 397 N.W.2d 479 (1986), stating, "A potential of increased governmental liability did not dissuade us from recognizing building inspector liability in Coffey." (Coffey v. Milwaukee, 74 Wis. 2d 526, 532-540, 247 N.W. 2d 132 (1976)). The court went on specifically to cite the safeguards created by the legislature in Sec. 893.80(3) in support of its decision.

Perhaps the most succinct statement of the fundamental policy supporting the rule of liability appears in Figgs v. City of Milwaukee, supra., "Following Holytz, a city may be liable for damages caused by the negligence of its employee. Holytz emphasized that fundamental fairness requires compensation for injuries so incurred."

CONCLUSION

We respectfully submit that the discretionary immunity doctrine should be revisited and amended or abandoned by this court. It is neither consistent with the Holytz decision and a number of subsequent pronouncements of this court endorsing that decision's abrogation of governmental immunity, nor does it comport with the statutory language governing those claims. The doctrine as currently applied has effectively reinstated governmental immunity, resulting in a broad based denial of the rights of injured persons that is logically and legally unsupportable.

Dated this 11th day of February, 2003.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809-19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; doubled spaced; 1.5 inch margins on the left side and 1 inch margins on the other 3 sides, and consisting of 2,822 words. The length of the brief is 15 pages.

Dated this 11th day of February, 2003.

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